

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case Nos. 08-13555(JMP); 08-01420(JMP)(SIPA)

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In the Matter of:

LEHMAN BROTHERS HOLDINGS INC., et al.

Debtors.

- - - - -x

In the Matter of:

LEHMAN BROTHERS INC.

Debtor.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

April 30, 2010

9:40 AM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

VERITEXT REPORTING COMPANY

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HEARING re Statement of the Securities Investor Protection Corporation in Support of Trustee's Motion for Relief Pursuant to the Sale Orders or, Alternatively, For Certain Limited Relief Under Rule 60(b)

HEARING re Objection of HWA 555 Owners, LLC to the Motions of Lehman Brothers Holdings Inc., James W. Giddens as Trustee for Lehman Brothers Inc., and the Official Committee of Unsecured Creditors of Lehman Brothers Holdings Inc. to Modify the September 20, 2008 Sale Order and for Other Relief

HEARING re Statement of the Bank of New York Mellon Trust Company in Support of the Motions for (I) an Order Modifying the September 20, 2008 Sale Order and Granting Other Relief and (II) to Unseal Motions for Relief from September 20, 2008 Sale Order (and Related SIPA Sale Order)

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HEARING re Joint Statement And Reservation of Rights of the
Bank Of Tokyo-Mitsubishi UFJ, Ltd. and Lloyds TSB Bank, plc in
Connection with (I) Motions of Lehman Brothers Holdings, Inc.,
The Official Committee Of Unsecured Creditors, And James W.
Giddens, as Trustee For Lehman Brothers, Inc., for Certain
Relief Pursuant to the September 20, 2008 Sale Orders; and (II)
Motion of Barclays Capital Inc. to Enforce the Sale Orders and
Secure Delivery Of Undelivered Assets

HEARING re Australia & New Zealand Banking Group LTD's Letter
Regarding Rule 60 Proceedings

HEARING re LibertyView's: (A) Joinder to (i) the SIPA Trustee's
Motion, (ii) the Committee's Motion; and (iii) LBHI's Motion
for Relief from the Sale Orders or, Alternatively, for Certain
Limited Relief Under Rule 60(b); and (B) Objection to Barclays
Capital Inc.'s Motion to Enforce the Sale Order

HEARING re Joinder of Newport Global Opportunities to
LibertyView's: (A) Joinder to (i) the Trustees' Motion, (ii)
the Committee's Motion; and (iii) LBHI's Motion for Relief from
the Sale Orders or, Alternatively, for Certain Limited Relief
Under Rule 60(b); and (B) Objection to Barclays Capital Inc.'s
Motion to Enforce the Sale Order

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HEARING re Motion of Debtor to Modify the September 20, 2008
Sale Order and Granting Other Relief

HEARING re Motion of the Trustee for Relief Pursuant to the
Sale Orders or, Alternatively, for Certain Limited Relief Under
Rule 60(b)

HEARING re Motion of Official Committee of Unsecured Creditors
of Lehman Brothers Holdings Inc., Authorizing and Approving (a)
Sale of Purchased Assets Free and Clear of Liens and Other
Interests; and (b) Assumption and Assignment of Executory
Contracts and Unexpired Leases, Dated September 20, 2008 (and
Related SIPA Sale Order) and Joinder in Debtors and SIPA
Trustees' Motions for an Order Under Rule 60(b) to Modify Sale
Order

HEARING re Motion of Barclays Capital Inc. to Enforce the Sale
Order and Secure Delivery of All Undelivered Assets

HEARING re Trustee's Adversary Complaint

HEARING re LBHI's Adversary Complaint

Transcribed by: Lisa Bar-Leib

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P R O C E E D I N G S

THE COURT: Be seated, please. And we can proceed with the trial.

MR. TAMBE: Good morning, Your Honor. Jay Tambe from Jones Day, special counsel to the debtor, Lehman Brothers Holdings, Inc.

RESUME DIRECT EXAMINATION

BY MR. TAMBE:

Q. Good morning, again, Mr. Clackson. How are you?

A. Good morning.

Q. Let's go back to a topic we were discussing at some length yesterday, and that has to do with cure, and what it is that you at Barclays knew about the magnitude of the cure assumed liabilities prior to this Court's entry of the sale order in the early hours of Saturday morning, the 20th of September. Okay? As of 9/19, which is the Friday --

MR. TAMBE: Can you put the calendar up, please, Steve?

Q. As of 9/19, September 19th, the Friday, you knew that the cure estimate that had been provided by Lehman to Barclays had dropped from 2.25 to 1.5 billion, correct?

A. Yes, that's correct.

Q. And you knew as of Friday that on the list of contracts provided to you by Lehman that the total list had total exposure, outside exposure, of 800 million dollars, correct?

1 A. I'm not aware that we had that list. I thought we got it
2 something over the weekend.

3 Q. Okay.

4 MR. TAMBE: May I approach, Your Honor?

5 THE COURT: Yes.

6 THE WITNESS: Thank you.

7 THE COURT: Thank you.

8 Q. Sir, I placed before you a document marked Movants' Trial
9 Exhibit 95. Take a moment to look at that series of e-mails
10 and let me know when you're done.

11 A. Yes, I've looked at the exhibit.

12 Q. And starting with the e-mail chain from the back of the
13 document to the front, you'll see that the last e-mail in the
14 chain is one from Gary Romain who was your head of technical
15 accounting, correct.

16 A. Yes, that's correct.

17 Q. And he is writing to Jay Westwood, and the subject is cure
18 payments. Do you see that?

19 A. Yes.

20 Q. Okay. And he writes to Jay that you, Patrick Clackson,
21 have suggested that you may be able to assist with an area of
22 judgment affecting the acquisition balance sheet. You see
23 that?

24 A. Yes.

25 Q. Okay. Drawing your attention to the second paragraph of

1 the e-mail that Gary has written to Jay.

2 MR. TAMBE: And if you could just highlight that
3 second paragraph.

4 Q. And he writes in there, "I believe you are looking into
5 this general area and was hoping you might have an initial view
6 of the proportion of the cures we might end up making. I
7 believe the total list is something like 800 million, but would
8 imagine we'll end up rejecting a significant proportion of the
9 underlying contracts." Do you see that?

10 A. Yes, I can see that.

11 Q. Okay. And if you go up in the document to the response
12 from Jay Westwood, Mr. Westwood writes back to Gary Romain, "I
13 understood the critical piece was 158 million when got it
14 Friday." Do you see that?

15 A. Yes, I can see that.

16 Q. And that's inline with your testimony yesterday where you
17 said that as of Friday, you, at Barclays, had identified what
18 you called mission-critical contracts which you need on day
19 one, and I think the number you used was around 200 million
20 yesterday.

21 A. Yes. I was aware there were some day one contracts, yes.

22 Q. Having seen this e-mail from Jay Westwood, would you agree
23 with me that the range for the mission critical contracts, the
24 day one contracts, was probably close in the range of 150
25 million as opposed to 200 million?

1 A. Yes. My understanding was that the day one, sort of,
2 critical contracts was a list we got from Lehman, so I -- this
3 may relate to the same list. I'm not sure. But that was my
4 understanding.

5 Q. I'm sorry, are you saying that the list of what was
6 critical --

7 A. List of day one --

8 Q. -- the list of what was mission critical was a
9 determination made by Lehman or a determination made by
10 Barclays?

11 A. I don't -- I thought we -- because we didn't have the time
12 to work out that list, I thought we got the list from Lehman
13 but that was my understanding. I, you know, wasn't involved in
14 the details, as I said, because I was in London.

15 Q. I just want to be clear on one issue. In terms of
16 identifying out of a list of all potential contracts that might
17 be subject to this cure, assumed liability, the decision as to
18 which were mission critical, that was a decision that you
19 believe was made by Lehman and not Barclays?

20 A. That was my belief at that time. I thought on the Friday,
21 we hadn't done, as I said, the detailed work to know which were
22 mission critical.

23 Q. And what's the basis for that understanding, sir?

24 A. That's just my recollection from the time. But --

25 Q. Someone told you that?

1 A. Probably, yes.

2 Q. Do you remember who told you that?

3 A. I can't remember the details.

4 Q. And had you made any assessment as to what proportion of
5 the list of contracts you believed that Barclays would be
6 assuming or be required to assume?

7 A. As I said, I didn't remember -- I thought the work was
8 done over the weekend. I didn't remember any of that work
9 being done until the next week. Obviously, from this, it looks
10 like some work was being done on that Friday -- or Thursday, --
11 sorry -- this is Thursday, isn't it?

12 Q. Okay. If you could turn in the binder of exhibits, if you
13 still have it before you --

14 A. Yeah.

15 Q. -- to tab 41, Movants' 41. And you recognize that, sir,
16 as an e-mail exchange -- an e-mail chain that first comes to
17 you from James Trevelyan, and then you forward it on to Rich
18 Ricci, do you see that?

19 A. Yes.

20 Q. Okay. And what James is asking you is, in the second
21 paragraph of his e-mail, he's trying to get some clarity around
22 the negative goodwill number again. Do you see that?

23 A. Yes.

24 Q. And he has there a version of the formula we talked about,
25 where you take the 2 and the 2.25 that's been listed in certain

1 schedules, the four and a quarter, and you take away from that
2 the circa 1.3 to come up with the negative goodwill number, do
3 you see that?

4 A. Yes.

5 Q. Okay, moving up to your response and forwarding that
6 response to Rich Ricci, you start of by telling Mr. Ricci the
7 official line FYI, do you see that?

8 A. Yes.

9 Q. And you were giving Mr. Ricci the official line with
10 respect to how to think about this accounting negative goodwill
11 concept, correct?

12 A. Yeah, what I said yesterday, because there was a lot of
13 confusion because people were asking to try and understand how
14 this negative goodwill arose and where it came from. But --
15 and they were asking Rich and myself, and I wanted to make sure
16 that Rich understood my understanding so that we didn't add
17 more confusion to the system.

18 Q. And in your explanation to Mr. Ricci, you didn't correct,
19 sort of, the formula or the math that was being used by James
20 to describe where the negative goodwill was arising from,
21 correct?

22 A. No. In this e-mail, I didn't make any reference to that.

23 Q. You mean, the formula was consistent with your view of how
24 that negative goodwill could be thought of, correct?

25 A. Sorry. I'd have to just read it to make sure.

1 Q. Yes.

2 A. Yes. So I -- yeah, yes, that's correct.

3 Q. All right. Now going up to your response to Mr. Ricci,
4 with respect to cure payments -- so that's the third paragraph
5 of your e-mail, you state to Mr. Ricci, cure payments are
6 optional. And though some will be incurred, most will be
7 covered by our ongoing supply relationships and fall into
8 monthly expenses. Do you see that?

9 A. Yes. That was my understanding.

10 Q. And you had reached that determination as of Friday,
11 September 19th, correct?

12 A. Yeah, yes, that's correct.

13 Q. And contracts that were covered by ongoing supply
14 relationships would be contracts that Barclays would have no
15 reason to assume, correct? You have existing relationships
16 with those suppliers.

17 A. I think as I said yesterday, yes, if we were getting some
18 of the services already, we wouldn't need to get the service
19 again, right.

20 Q. And you knew as of September 19th that that was true with
21 respect to most of the contracts on the list?

22 A. I don't know if I knew that. I think at the time I hoped
23 that was the case. But I don't think I had any knowledge,
24 because as I said, I don't think we'd had the time to go
25 through all the details at that point.

1 Q. Well, you don't say to Mr. Ricci, "I hope most will be
2 covered," do you, sir? You say, "Most will be covered." Is
3 that right?

4 A. Yes. I also say I don't -- I don't say that I know most
5 will be covered, as well.

6 Q. And this is still the week where you are being
7 conservative and not being a cowboy, correct?

8 A. We're trying to work out what the right accounting rate,
9 the transaction is.

10 Q. You're not trying to suggest to Mr. Ricci in this e-mail
11 that, well, there won't be many assumed liabilities. If
12 anything, you want to be erring on the side of saying well,
13 there may be substantial liabilities, but that's not what you
14 say. You say most will be covered by our ongoing
15 relationships, correct?

16 A. As I said, that was my hope at the time.

17 Q. And you know that to be the case on September 19th,
18 correct?

19 A. That's not correct. As I said, I didn't know. I hoped
20 that was the case, but I didn't have the knowledge.

21 Q. If we could turn back to another document we discussed
22 yesterday. This was M-45, Movants' 45.

23 MR. TAMBE: Steve, if you could just blow up the e-
24 mail, please.

25 Q. And we discussed yesterday that you had received an Excel

1 spreadsheet from Jason Yang, which you then forwarded on to
2 Rich Ricci. Do you remember that discussion?

3 A. Yes, we did.

4 Q. And this is happening on Friday, September 19th, correct?

5 A. Yes.

6 Q. Okay, we had also looked at the second page of this
7 exhibit which is a print-out of the Excel spreadsheet. Do you
8 see that?

9 A. Yes.

10 Q. And it was your understanding that this was a document
11 created by Barclays, correct?

12 A. I don't think I said I knew who it had been created by,
13 but it was my understanding, as I said yesterday, it was
14 something which gave us some idea of what was coming across in
15 the Fed facility. I don't think I had any understanding of
16 where it came from. Jason Yang did work for Barclays who
17 forwarded it.

18 Q. And he worked in the same group as Mr. King, correct?

19 A. Yes, he worked for Mr. King.

20 Q. Okay, keeping your attention on M-45, I'm going to ask for
21 the native version of that Excel spreadsheet to be pulled up
22 because the document was produced in a native Excel format, so
23 we can see the Excel data.

24 A. Okay.

25 MR. TAMBE: Steve, could you do that, please?

1 And Your Honor, that's been identified by the movants
2 as Movants' Exhibit 45N, as in Nancy, to suggest that that's a
3 Native format document.

4 MR. SCHILLER: Your Honor, we have no objection to it.
5 (Movants' Exhibit 45N, Native version of Excel spreadsheet, was
6 hereby marked for identification as of this date.)

7 Q. And as you take a look at the document on the screen,
8 that's the native format document. Feel free to compare it to
9 the documents you have in your binder under Movants' 45.
10 Please confirm for us that that is, in fact, the same
11 spreadsheet.

12 A. It looks very similar. I suppose my -- obviously, the
13 spreadsheets people can go in and change cells and change
14 things, so -- the numbers, here, look the same. You know,
15 things like the highlights and whatever, I've no -- I don't
16 know that is exactly the same version or if something's been
17 changed, just so the Court understands that.

18 Q. Okay. And just to make sure, in response to your last
19 comment about whether things may have been changed on this
20 document --

21 MR. TAMBE: Can we please pull up the metadata on
22 M-45, then?

23 Q. And you'll see, sir, there, it shows that the author of
24 this document is someone called Yang, J.A., and it was last
25 saved by Clackson, P. Do you see that?

1 A. Yes.

2 Q. Right. And the company is Barclays Capital, Inc. Do you
3 see that?

4 A. Yes.

5 Q. And you see the time content created, 9/19, 4:13 a.m. Do
6 you see that?

7 A. Yes.

8 Q. And last save, 9/19, 7:08 a.m., correct?

9 A. Yes.

10 Q. You have no reason to doubt that any of that information
11 is full and accurate, right?

12 A. No, no. I have none.

13 Q. Thank you. Could you turn in your book to Exhibit
14 Movants' 579, please?

15 MR. TAMBE: Steve, could you pull up 579, please?

16 A. I'm sorry. 579?

17 Q. 579. And you recognize this, sir, do you not, as a cover
18 e-mail from Gary Romain to you and Rich Ricci and James Walker,
19 do you see that?

20 A. Yes. I can see that.

21 Q. And starting as early as the weekend, the 20th, there were
22 a series of similar e-mails, each attaching different
23 iterations of the acquisition balance sheet, correct?

24 A. Yes, that's correct. I can see this one is on the --

25 Q. This is on the 22nd.

1 A. Yeah. On the evening of the 22nd, it appears.

2 Q. Okay. I promise you I'm not going to take you through
3 every single one of those iterations.

4 A. Thank you.

5 Q. But I'm going to take you through a few of the iterations.
6 So focusing on this particular one, you see in the cover e-
7 mail, there's a discussion of various items, and the last item
8 makes a reference to "the 2.83 billion valuation adjustment is
9 S. King's first cut only". Do you see that?

10 A. Yes, I do.

11 Q. And that's a reference to Stephen King, correct?

12 A. Yes, I think so.

13 Q. The trader in the PMTG group, correct?

14 A. Yes.

15 Q. And he's been involved throughout the week in negotiating
16 prices across the table from Lehman, correct?

17 A. Yes. So he was one of the traders who was involved in
18 large, as I said, follow the asset-backed securities to try and
19 work out what the fair market value of those was.

20 Q. And you can see here he has input on the acquisition
21 balance sheet that's being prepared by Gary Romain and others,
22 correct?

23 A. Yes.

24 Q. And if you turn to the spreadsheet itself, which is the
25 third page behind the tab, first focusing attention to the

1 upper left-hand quadrant of this document which is the
2 financial assets calculation. Do you see that?

3 A. Yes, I can see that.

4 Q. Okay. The financial assets subtotal up to 50.32 billion
5 there, correct?

6 A. Yes, that's correct.

7 Q. Okay.

8 A. Yes, it is correct. I'm obviously not able to add it up
9 in my head, but --

10 Q. Well, assuming Mr. Romain has created an accurate Excel
11 spreadsheet.

12 A. I assume it probably was correct and Gary is.

13 Q. He is your head of technical accounting, right?

14 A. Yes.

15 Q. That 50.32 number is after taking into account the 2.83
16 billion valuation adjustment, you see that?

17 A. Yes, I see that.

18 Q. That's Mr. King's first cut at reducing the valuations of
19 the financial assets, correct?

20 A. Getting to the fair market value of the assets, yes.

21 Q. And you have an item there below the valuation adjustment
22 two lines down, cash: seven billion. Do you see that?

23 A. Yes, I can see that.

24 Q. And that, as you told us yesterday -- may have told us
25 yesterday relates to the JPMorgan piece of the Fed repo assets

1 that were supposed to come over. Some did not come over.

2 There was a seven billion dollar cash component created as a
3 result, correct?

4 A. Yes.

5 Q. So that cash line there is sort of the JPM line, correct?

6 A. Yes. That was the cash due from JPMorgan.

7 Q. And therefore, the adjustment that Mr. King is making is
8 to the rest of the inventory, the inventory that had made it
9 over.

10 A. Yes, that's correct. So he can -- well, he can only
11 adjust the inventory which he knows about.

12 Q. And then in calculating the liabilities further down --
13 well, let me -- before we get to the liabilities, there's a
14 note 5 -- do you see that -- next to the valuation adjustment.

15 MR. TAMBE: And if we could just blow up the note a
16 little bit further, please?

17 Q. And Mr. Romain notes in that footnote, trades are
18 initially booked at BoNY prices. That's the Bank of New York
19 prices, correct?

20 A. Yes, that's correct.

21 Q. And Bank of New York was the custodial agent for the tri-
22 party repo between Lehman and Barclays, correct?

23 A. Yes. That was my understanding.

24 Q. And the Bank of New York was Barclays' agent in that
25 agreement, correct?

1 A. That might be right. I don't know, technically, actually,
2 what their position was.

3 Q. And so you understand this document to show that what is
4 being done here is a valuation adjustment to the prices that
5 were initially booked at BoNY prices, at Bank of New York
6 prices?

7 A. Yes. That would be my understanding of this.

8 Q. Okay. And then going back into the full document and the
9 liability section --

10 MR. TAMBE: And if we could blow up the liability
11 section, the total liabilities.

12 Q. And what you list on there is the repo liability of forty-
13 five billion. You've listed cure payment in the amount of 800
14 million, do you see that? So not the 1.5 or the 2.25 for the
15 reasons that you've told us before.

16 A. Correct.

17 Q. Got nothing on retention payments, and there's a note
18 related to that, "Details to be forthcoming," do you see that?

19 A. Sorry, I think that note -- you say that relates to
20 retention payments. I think that relates to the cure payments,
21 that note.

22 Q. So there's no note related to the retention payment.
23 Losing my eyesight. And then there's a bonus accrual line of
24 1.7. Do you see that?

25 A. Yes, and I can see that. What I don't know, specifically,

1 is that total compensation or what the components of that are.

2 Q. Okay. In any event, all of those total liabilities round
3 up to about 47.50.

4 A. That's -- that's correct, yes.

5 Q. Right. And that drives a net asset number, and that, in
6 turn, drives a negative goodwill number of 2.98. Do you see
7 that?

8 A. Yes, that's correct.

9 Q. And just keep in mind the two numbers that we've just
10 discussed: the 50.32 which is the total financial assets
11 number, and the total liabilities number of 47.50. And this is
12 where things stood on the evening of the 22nd of September,
13 Monday, the Monday following the closing -- the Monday of the
14 closing date, correct?

15 A. Yes.

16 Q. The transaction had closed prior to the markets opening
17 that day.

18 A. Yes. Yes. So this is a working draft at that point. As
19 you said a bit earlier, the numbers were changing quite a lot,
20 and obviously, as set out here, this is provisional at that
21 point. But you're correct, this was the latest data, the
22 latest draft we had then.

23 Q. Okay. Now, just focusing on the assets and Barclays
24 writes the assets, you understand, sir, do you not, from the
25 asset purchase agreement, that the parties have specifically

1 agreed that title and interest in the purchased assets would
2 transfer as of 12:01 a.m. the day of the closing?

3 A. I'm not sure I can remember that detail.

4 Q. If you could turn to Movants' Exhibit 1, please, and in
5 particular, to page 15. If you take a look at the paragraph
6 titled 4.1 Closing Date. Do you see that? And the last
7 sentence. It says, "Unless otherwise agreed by the parties in
8 writing, the closing shall be deemed effective and all right,
9 title, and interest of seller to be acquired by purchaser
10 hereunder shall be considered to have passed to purchaser as of
11 12:01 a.m. time on the closing date." You see that?

12 A. Yes, I can see that.

13 Q. And you are aware of no agreement by the parties in
14 writing to the contrary, sir, are you?

15 A. I've got no recollection of such agreement.

16 Q. Okay. With respect to the assets that had been acquired,
17 the financial assets --

18 MR. TAMBE: And if we could go back to 579, please.

19 Q. Please, Mr. Clackson, feel free to go back to 579 which
20 was the acquisition balance sheet we were looking at. Putting
21 aside the JPM component, the cash of seven billion, the other
22 inventory that is talked about there -- there was substantial
23 amount about inventory that had come over Thursday night,
24 correct, as part of Barclays taking over the Fed repo, correct?

25 A. I think, as I said earlier, I wasn't in New York. I think

1 it did come in dribs and drabs through the week. I don't know
2 exactly how much came when.

3 Q. Well, you knew that you had a substantial -- so you had
4 substantial possessions in Barclays' books by the Friday the
5 19th, correct?

6 A. I knew that we were taking on all these long positions.
7 Physically, what had been delivered and when that was
8 physically delivered, I don't know. But I knew we were exposed
9 to now, as I said, a transaction where we just were taking on
10 long positions, yes.

11 Q. And you were aware with respect to the long equity
12 positions which were approximately eight billion dollars of
13 long equity positions, correct?

14 A. Yes. Specifically, I was very aware of that.

15 Q. And in fact, the markets, with respect to those eight
16 billion dollars of long equity positions moved significantly in
17 Barclays' favor on Friday the 19th, correct?

18 A. Yes, the equity market rallied significantly on Friday,
19 you're right.

20 Q. If you could turn to M-230, please. Movants' 230.

21 MR. TAMBE: And if you could just blow up that e-mail,
22 please. Actually, the entire text, really.

23 Q. This is an e-mail chain. That's you at the top of the e-
24 mail chain corresponding with Lee Guy. Do you see that?

25 A. Yes, I can see that.

1 Q. And then further down, there are other e-mails between Lee
2 and you. Do you see that?

3 A. Yes.

4 Q. And he makes a reference at the bottom of the page to the
5 eight billion dollars long equity position. Do you see that?

6 A. Yes, I can see that.

7 Q. Okay. Now, you respond to him in your e-mail where you
8 say trade date is Monday, completion 7 a.m.

9 A. Yes, that's correct.

10 Q. All right. And that was your anticipation as of Sunday
11 the 21st as to when the actual documents would be signed --

12 A. Yeah.

13 Q. -- the paper closing, correct? And Lee Guy writes back to
14 you and says "I thought valuations were agreed for an earlier
15 date." Do you see that?

16 A. Yes, that's correct.

17 Q. Okay. And then you respond by saying, "Yep, so we made a
18 load." Do you see that?

19 A. Yes, I can see that.

20 Q. So you don't disagree with Mr. Guy that valuations were
21 agreed for an earlier date, do you?

22 A. It's -- no, I don't disagree. It's a kind of strange e-
23 mail in that way because -- yeah, I don't disagree, but you're
24 right.

25 Q. You have no reason to doubt that you sent this e-mail, do

1 you, sir?

2 A. No, no, I don't. No, I don't. It's my e-mail.

3 Q. Okay. All right. And you go on to say, "Yep, so we made
4 a load." Do you see that?

5 A. Yes, I can see that.

6 Q. And you're referring to the load that Barclays made on the
7 long equity positions?

8 A. Yes, sir, because the equity market rallied and because I
9 knew we had a long equity eight billion position, I thought we
10 made money on those equities moving up in market value on the
11 Friday.

12 Q. Okay. How big was that load?

13 A. I've got no recollection. I think because we hadn't
14 booked all the equities and we had the high level information
15 that we had eight billion equities, we knew the S&P had
16 rallied. And therefore, we said we should have made some money
17 because the S&P had rallied. I don't know if we have a detail
18 of how much that was. I can't recall any specific numbers.

19 Q. 200 million?

20 A. As I said, I can't recall.

21 Q. 400 million?

22 A. As I said, I've got no recollection.

23 Q. All right. Let's go back to 579, please. By the way, on
24 Friday the 19th, you didn't get an e-mail saying we've lost a
25 bundle on the nonequity positions, did you, sir?

1 A. No, I don't --

2 Q. No such e-mail, sir.

3 A. -- I can't remember such an e-mail, no.

4 Q. So going back to 579, we had talked about the net assets,
5 and then we talked about the negative goodwill number on that
6 acquisition balance sheet of 2.98.

7 A. Yes, that's correct.

8 Q. In the board presentation that had been made earlier in
9 the week to Barclays' board, the board had been told the
10 expected negative goodwill from the transaction would be three
11 billion. Do you remember that?

12 A. Yes, I think that was the number.

13 Q. So this is coming in a little shy of that negative
14 goodwill?

15 A. Yes.

16 Q. And in part, that negative goodwill is at 2.98 because
17 you've got a 2.83 billion dollar negative adjustment on the
18 financial assets, correct? That's the math.

19 A. Yeah. The math, the 2.98 reflects everything above it in
20 the balance sheet.

21 Q. Okay. How did that go down -- how did that 2.98 number go
22 down with your boss, Rich Ricci.

23 A. I can't remember. As I said, we had lots of acquisition
24 balance sheets. And some showed higher negative goodwill, some
25 showed lower. I think, generally, we wanted a number as high

1 as possible. So it was lower, probably went down badly; when
2 it was higher, it went down well. That was generally the
3 reaction.

4 Q. And if we turn to Movants' 580, we can see one of his
5 reactions to this number. And if you can turn to the second
6 page of that exhibit, you'll see that last e-mail --

7 A. Sorry, exhibit --

8 Q. M-580. And you can compare to what you have on the
9 screen, just to make sure you have the right document. Are you
10 there, sir?

11 A. Yes.

12 Q. Okay. So if you look at the second page of Exhibit 580,
13 that last e-mail is the e-mail that was the cover e-mail on the
14 acquisition balance sheet, 579, that we were looking at,
15 correct?

16 A. Yes. It appears to be the same.

17 Q. So this is an e-mail chain that starts off with that
18 message, and there's a series of back and forths.

19 A. Yes.

20 Q. And in corresponding with Mr. Ricci with respect to that
21 balance sheet, you say in the next e-mail up in the chain, "So
22 some things we have to keep working on to squeeze out what we
23 can, but looks more like 3 to 3.5 rather than 4 plus. Basic
24 issue is outside repo, not enough assets." Do you see that?

25 A. Yes, I can see that.

1 Q. And in part, the valuation of the repo assets is being
2 driven by what Mr. King is doing, in terms of his valuation
3 exercise, correct?

4 A. Yes. So he's going to fair value the assets.

5 Q. And go on the first page of 580. There's discussions
6 about other points, but the third e-mail from the top is from
7 Mr. Rich Ricci to you.

8 A. Yeah.

9 Q. And he says, "Need to get to four or no write-down
10 capacity." Got a typo in his e-mail, but it's write-down
11 capacity.

12 A. That's correct.

13 Q. And you understand that as a reference to write-down
14 capacity.

15 A. Yeah. I think what I said in my deposition is the same
16 thing. Precisely what he meant, you should ask Mr. Ricci
17 exactly what he meant by that.

18 Q. You had no idea what he meant by that?

19 A. I think, as I said before, he was trying to get to as
20 large a number as possible.

21 Q. What's he trying to write-down?

22 A. But in terms of exactly what he's talking about, yeah, I
23 can't recall exactly, and you should talk to Mr. Ricci.

24 Q. I'm sure we will. What did you do in response to that
25 statement or observation from Mr. Ricci, "Need to get to four

1 or no write-down capacity"? Well, if you didn't understand
2 what he meant, you probably didn't know what to do, right?

3 A. Yeah -- no. I mean, as I said, we were looking at
4 everything, and yes, we obviously wanted as large a number as
5 possible.

6 Q. Let's go to Movants' 229, please. Are you there, sir?

7 A. Yes.

8 Q. And that's another iteration of the acquisition balance
9 sheet, this one dated the 24th of September.

10 A. That's correct, yes.

11 Q. The day after Mr. Ricci stating need to get to four or no
12 write-down capacity, right?

13 A. Was that on Tuesday? Yes --

14 Q. Take a look. It's Exhibit 580.

15 A. Yes.

16 Q. And if you look at the negative goodwill number on
17 Movants' 229, there you have Mr. Ricci's number: 4.47 negative
18 goodwill. Do you see that?

19 A. I don't think it's Mr. Ricci's number, but I can see we
20 have a higher negative goodwill number. I mean, as I said, and
21 you can see from the footnotes here, there's huge confusion as
22 we were trying to work out what we had. People were doing the
23 work to try to work out what the different pieces were, and I
24 think you can see on this balance sheet, there were a
25 significant number of items which have moved on the balance

1 sheet. I haven't done a map, but as we went through time,
2 stuff was changing.

3 Q. Well, I took a look to see, kind of, what had changed over
4 the course of that day. And if you look at this acquisition
5 balance sheet, Movants' 229, take a look at the valuation
6 adjustment. That's Mr. King's number, correct?

7 A. Sorry, I can't --

8 Q. It may be a little bit better on the screen.

9 A. Sorry, it's very vague on my monitor.

10 MR. TAMBE: Do we have a native version of this?
11 Could you pull that up, please?

12 With your permission, Your Honor? We're asking to
13 pull up the Excel version of this document.

14 THE COURT: All right.

15 MR. TAMBE: It might be easier to read.

16 THE COURT: That leads to a question in my mind, and
17 this is really a question in general application. I noticed it
18 in reference to Exhibit 45N which is Exhibit 45 in native form.
19 How are these electronic documents separately in evidence? Is
20 it simply part of the record that you have referred to them and
21 that they've been used in questioning? Or do I have physical
22 versions of them to refer to if I need to?

23 MR. TAMBE: If you don't already have physical
24 versions of these, you will have a CD with the Excel files on
25 them --

1 THE COURT: All right.

2 MR. TAMBE: -- with the metadata.

3 THE COURT: Fine, thank you.

4 MR. TAMBE: Thank you, Your Honor.

5 Do we have that on Excel? Maybe we don't.

6 Q. Are you having trouble making out that writing, sir, the
7 valuation, BoNY Thursday close, and below that, valuation
8 adjustment, 1.38?

9 A. Yes, it looks like 1.38. That's what it looks like.

10 Q. So the day before, two days before, it was 2.83 --

11 A. Your question was is that Stephen King's adjustment.

12 Q. Yeah.

13 A. I was just trying to -- yeah, this doesn't say here that
14 it's Stephen King's adjustment. So I don't know why that
15 number changed and I don't know what -- I don't know this is
16 Stephen's latest adjustment or not.

17 Q. Well, other than Mr. King, are you aware of any other
18 trader at this point in time who is providing valuation
19 adjustment inputs on the acquisition balance sheets, sir?

20 A. I wasn't aware. I'm just saying that it doesn't say here
21 that this is Mr. Stephen King's adjustment.

22 Q. Okay. So either Mr. King or someone else changed the
23 valuation adjustment of 2.83 down to 1.38, and that is the main
24 driver that pushes the negative goodwill number over 4.47, do
25 you see that?

1 A. Yes, I'm -- as you said, there were many versions of this
2 document, and I know as well as the traders who were doing the
3 marking exercise, we also had people like people working in the
4 control group who were also trying to do a bottom-up booking
5 the trades exercise. So I don't know, is what I'm saying, if
6 this is Stephen King's number or coming from somewhere else
7 like the product control group.

8 Q. Well, on the 24th of September, sir, you are aware that
9 the PCG group was just getting its process underway, correct?
10 It took them months to get that done.

11 A. Yeah. It took them a long, long time. I don't know
12 this -- but all I'm saying is I just don't know the source of
13 that number.

14 Q. So you're guessing. You're guessing it might have been
15 PCG.

16 A. Or I'd be guessing it was Stephen King.

17 Q. But at this point in time in September 2008, you're not
18 aware of anyone other than Stephen King who has been providing
19 input on the valuation adjustments on these acquisition balance
20 sheets, correct?

21 A. I think all I'm saying is I don't know where that came
22 from. I -- Gary Romain would have a better idea, I think, than
23 I would about precisely where that came from.

24 Q. And knowing Gary, as you do, and having him as your head
25 of technical accounting, Gary wouldn't just make up that

1 number, correct? He wouldn't put that number in there unless
2 someone gave it to him --

3 A. I think Gary --

4 Q. -- a trader gave it to him.

5 A. -- Gary would have some source where he got that number
6 from, yes.

7 Q. Can we next go to M-668? And this is another cover e-mail
8 with another acquisition summary balance sheet -- or,
9 acquisition balance sheet attached to it. Do you see that?

10 A. Yes, I can see this. This looks like it's a week or so
11 later.

12 Q. Yeah, we're into early October, now.

13 A. Yes, right.

14 Q. And there's a cover e-mail at the bottom of that e-mail.
15 This is from you to James Walker and others, do you see that?

16 A. Yes.

17 Q. And the subject line reads, "Need the latest on
18 acquisition balance sheet ASAP." And you continue to say "and
19 all areas where we may have upside. Looks like we will need as
20 current JP offer is one billion cash and six billion
21 securities, which Stephen values at 4.3 billion." Do you see
22 that?

23 A. Yes, I can see that.

24 Q. Right. And so this is a reference to the conversion of
25 the seven billion dollars of cash into something different from

1 JPM, which is a billion in cash and six billion in securities,
2 correct?

3 A. Yes, that's correct. That was my understanding.

4 Q. Right. And you note at the end, Stephen values those
5 securities, those six billion dollars of securities, at 4.3
6 billion. Do you see that?

7 A. Yes, I can see that. I -- the only thing I'm -- I can't
8 recall whether that Stephen values just the securities or
9 whether it's the securities and the cash. But I'm sure that's
10 shown in other documents.

11 Q. If you could just keep the microphone close to you. I
12 lost --

13 A. Sorry.

14 Q. I lost the end of your answer, there.

15 A. Shall I repeat what I said?

16 Q. If you could, please.

17 A. Yeah. So the only thing -- I can't recall whether this is
18 saying Stephen values the securities at 4.3 or whether the 4.3
19 relates to the securities and the cash. I just can't recall.
20 It's not clear in this e-mail.

21 Q. So the confusion in your mind is it might be this total
22 bundle of seven billion, one billion cash, six billion
23 securities, that entire bundle could be valued by Stephen at
24 4.3.

25 A. I can't remember if it's 4.3 or 5.3. And maybe it shows

1 in the subsequent document.

2 Q. Do you know exactly -- and the Stephen you're talking
3 about here is Stephen King, correct?

4 A. That's correct, yes.

5 Q. Did you have discussions with Stephen King as to how he
6 came up with that number?

7 A. As I said, Stephen was trying to fair value the securities
8 which we took on. I think with the ones from JPMorgan, I -- my
9 recollection is we didn't have all of the detail about what
10 they were. But I think maybe Stephen did get some detail, but
11 we had a lot of different lists which we were trying to use in
12 terms of what the underlying securities were.

13 Q. Well, you knew, did you not, sir, that that 4.3 billion
14 dollar number that Stephen had come up with, he was deriving,
15 applying the haircuts to the Fed's facility, correct?

16 A. I can't remember if I knew that at the time.

17 Q. If you could turn to 701, please.

18 MR. TAMBE: Don't put it up.

19 Q. If I could draw your attention to -- there's a long series
20 of e-mails, but I want to draw your attention to the last in
21 the series of e-mails.

22 MR. SCHILLER: Your Honor, we're going to object to
23 this exhibit which we were given yesterday on grounds of
24 hearsay. The witness is not involved in this transmission at
25 all.

1 THE COURT: I'm sorry, I can't hear you, Mr. Schiller.

2 MR. SCHILLER: The witness is not involved in this
3 communication at all. It concerned the JPMorgan settlement
4 which is before Your Honor, that's in December 2008.

5 MR. TAMBE: If I may respond, I think his name appears
6 in the last e-mail. It was addressed to him.

7 THE COURT: What's the Bates number that --

8 MR. TAMBE: I'm sorry, it's Bates number 97, last two
9 numbers.

10 THE COURT: Well, it's true that Mr. Clackson did
11 receive, it appears, on Sunday, October 5, an e-mail from
12 Stephen King, along with a number of other Barclays employees.
13 On the question of admissibility, I'll reserve judgment until I
14 see how the document is used. But even if the document is not
15 admissible or includes hearsay elements, there's no reason why
16 the witness can't be questioned about it. So I'm simply
17 reserving on whether or not it's ultimately admissible.

18 MR. SCHILLER: All right. I would just point out to
19 the Court, as was the case yesterday in the exhibit you and I
20 discussed, Your Honor, this e-mail is at the very beginning,
21 and it's not the communication he's about to ask the witness
22 about. In other words, the Stephen King e-mail on which he's
23 copied is the very beginning of e-mail communication between
24 Mr. Hughes and Ms. Leventhal. Thank you, Judge.

25 THE COURT: Okay, he can still use the document.

1 Whether it ever ends up in evidence, we'll find out later.

2 BY MR. TAMBE:

3 Q. Mr. Clackson, drawing your attention to that e-mail that
4 begins on Bates number 97 and carries on over to Bates number
5 98, you recognize that as an e-mail you received from Mr. King,
6 correct?

7 A. Yes, that's correct.

8 Q. And this is an e-mail that Mr. King would have prepared
9 and sent to you in the ordinary course of business, correct?

10 A. I don't know what you mean the ordinary course of
11 business, but as part of a deal, yes, he was sending me a lot
12 of things to keep me updated about what was happening, what was
13 going on.

14 Q. Right. Part of -- one of his jobs in this transaction was
15 to focus on the collateral and valuation issues and update the
16 accounting team --

17 A. Yes.

18 Q. -- the finance team about those issues, correct?

19 A. That's correct.

20 Q. And you recognize this e-mail as part of that business
21 effort?

22 A. Yes, that's correct.

23 MR. TAMBE: Your Honor, we offer Exhibit 701 in
24 evidence.

25 MR. SCHILLER: Sorry, Your Honor. I have the same

1 objection to continues on from the internal Barclays e-mail
2 that he has put before Mr. Clackson, and that is Barclays'
3 communication with the creditor.

4 THE COURT: Well, since I don't know how the document
5 is going to be used in the questioning of the witness, it will
6 be admitted for purposes of the communication to Mr. Clackson
7 and others, which is the start of the e-mail chain.

8 But I'm going to reserve judgment on the balance of
9 the document, and it's not admitted for those purposes -- these
10 other purposes, unless there's some way to connect this witness
11 to the other communications, including communications with
12 Shari Leventhal of the New York Fed, which seem to be the
13 principal components of the first few pages of the document.

14 It's entirely possible that through other witnesses,
15 this document may later become admissible for all purposes,
16 which raises, of course, the question that I continue to have
17 as to how documents are being used in the case. At the very
18 beginning of the trial, on Monday, I was handed an exhibit list
19 of exhibits which are not the subject of objections and, as a
20 result, are all deemed to be admitted. Presumably, the process
21 that led to this agreed list is one in which documents have
22 been determined by means of deposition testimony or sources of
23 production to be authentic and, in all respects, reliable. I
24 don't know why this document, in particular, is subject to a
25 present debate in the course of the trial and why it isn't on

1 the list of admitted documents or whether it can later be
2 admitted. But it is not my position to question the trial
3 techniques of anyone involved in the case.

4 As a technical matter, I believe Mr. Schiller is
5 correct that the document, at least as it's being presented to
6 me now, appears not to relate to this witness except at the
7 beginning. So I'll admit it for purposes of whatever use you
8 wish to make of it with the witness as to the beginning of the
9 document where he has acknowledged having received it, and I'll
10 reserve judgment as to the balance.

11 (Movants' Exhibit 701, e-mail chain between Mr. King and Mr.
12 Clackson and others, was hereby received into evidence for a
13 limited purpose only as of this date.)

14 MR. TAMBE: Thank you, Your Honor. I intend to
15 examine Mr. Clackson only with respect to that e-mail at the
16 beginning of the e-mail chain. We obviously reserve our right
17 to seek to admit the rest of the document --

18 THE COURT: Fine.

19 MR. TAMBE: -- through other witnesses.

20 THE COURT: In that case, I didn't need to go through
21 this entire discourse on the document, but fine. We'll --

22 MR. TAMBE: And I really didn't want to interrupt you,
23 Your Honor.

24 THE COURT: We'll admit it only for that portion of it
25 where the witness is involved and to which you intend to

1 question him.

2 MR. TAMBE: And just in response to Your Honor's
3 observation. The reason this document is not on the list you
4 were submitted is we were told that there would be objections
5 to this document.

6 THE COURT: And you were told correctly --

7 MR. TAMBE: We were told correctly.

8 THE COURT: -- because Mr. Schiller did, in fact,
9 object, and we did spend three minutes talking about it.

10 BY MR. TAMBE:

11 Q. Turning your attention, Mr. Clackson, to the e-mail from
12 Mr. King to you and others, you will see in that e-mail, Mr.
13 King sets out his rationale for valuing the one billion cash
14 and six billion in securities from JPMorgan. Do you see that?

15 A. I can see calculations. I can't quite see where it says
16 it's a rationale for valuing. I can see at the bottom of the
17 e-mail on -- below where it says net cash received, it says "we
18 estimate the collateral to be worth 4.3 billion." I can't see
19 how that calculation is derived.

20 Q. If you look at principle 1 in Mr. King's e-mail, he states
21 there "the ratio of collateral to cash should be at least the
22 ratio on the original facility." Do you see that? "Therefore,
23 six billion of collateral is worth 5.34 of cash." Do you see
24 that?

25 A. Yes, I see that.

1 Q. You don't recognize that or understand that to be a
2 valuation calculation, is that what you're saying?

3 A. Yes.

4 Q. Okay. Did you have any conversations with Mr. King about
5 this calculation?

6 A. I can't remember having any conversations about this
7 calculation.

8 Q. Did you have conversations with anyone else about this
9 approach to calculation?

10 A. I think, as I said, I wasn't really very involved in this.
11 I was copied and/or these documents were sent to me, but in
12 terms of the exact logic in the calculations, I've got no
13 recollection of them.

14 Q. Okay. Well, did you believe the calculations were
15 reliable?

16 A. That -- what we were trying to get from Stephen King was
17 the fair market value of the assets. I believe when we got the
18 final numbers -- Stephen knew we were trying to get fair market
19 values, and when we got the -- those final numbers, we would
20 have got the fair market values of the assets, which then,
21 independently, as you know, we tested within our product
22 control group. And so in terms of this calculation, I don't
23 understand how that fits into this.

24 Q. If I understand you correctly, then, what you're saying is
25 that this calculation based on ratios and haircuts you don't

1 believe to be a fair market valuation exercise?

2 A. I think I'm just saying I don't understand this
3 calculation or what he's doing.

4 Q. But you certainly don't recognize it as a fair market
5 valuation exercise, correct?

6 A. Yeah. I don't understand it, so -- and I wasn't -- I
7 don't remember focusing on it, so I don't know if it is or
8 isn't, to be honest.

9 Q. If I could ask you to turn to Movants' 668, please? And
10 that's the document we were discussing which began with your e-
11 mail at the bottom about the JPM offer -- the JP offer, one
12 billion cash, nine billion securities -- oh, six billion
13 securities.

14 A. Yes.

15 Q. And there's a spreadsheet attached to this document. If
16 you could turn to the spreadsheet, please.

17 A. Yes.

18 Q. And this is an updated acquisition balance sheet, and the
19 seven billion cash component is now gone, correct?

20 A. Yes, that's correct.

21 Q. Instead, what you have are two components: cash, 1
22 billion; securities from JPM, 4.3 billion.

23 A. Yes, that's correct.

24 Q. And that's the 4.3 calculation from Stephen King.

25 A. Well, it's the 4.3 from the end of that e-mail, yes.

1 Q. And in fact, at the bottom of the page, footnote 10, or
2 note 10 states that's an initial estimate of fair value?

3 A. Yes, that's correct.

4 Q. And this is a document prepared by Gary Romain, correct?

5 A. That's correct, yes.

6 Q. Okay. Other than the calculation that we just walked
7 through in Exhibit 701, are you aware of any other calculations
8 that were done at this point in time to arrive at the 4.3
9 billion dollar number for that JPM collateral?

10 A. Yeah I wasn't aware of any other calculations, though I'm
11 still not quite sure if I understand how that 4.3 was derived
12 from that calculation on the earlier e-mail.

13 Q. I suppose we'd have to ask Mr. King that.

14 A. Yes, well, he would be the right person, obviously, to
15 talk to.

16 Q. Turn to Movants' 105, please. It's a multipage document,
17 and you recognize this document, right, sir?

18 A. It's a spreadsheet of which there were many. I don't know
19 if you could help explain what it is to me.

20 Q. I'm sorry, I will need to explain it to you?

21 A. Yes. Sorry, we have many spreadsheets which look like
22 this, so I don't recognize each version of a spreadsheet with
23 different numbers on it. I don't have, as I think I told you
24 earlier, a photographic memory around numbers.

25 Q. Well, let's go to the first document, see if that rings

1 any bells. Do you recognize that as a spreadsheet that rolls
2 into your earnings announcement issued on or about February
3 9th, 2009 by Barclays?

4 A. Sorry, yes, it does look like. But the footing reconciles
5 to our earnings announcement, yes.

6 Q. Okay. So that's -- at the end of the day when all the
7 to's and fro's on the acquisition balance sheet are done,
8 that's what you end up with, right?

9 A. Yes. I assume that's the case. As I say, I'm, you know,
10 validating whether this is the final version. I'm unable to
11 validate that this is, but it looks like the number at the
12 bottom reconciles. I have no reason to believe it isn't.

13 Q. And do you understand that the spreadsheets that are
14 attached to this cover document are the guts of the
15 calculation; they explain how the calculation was arrived at?

16 A. I think there would be further analysis behind this.

17 Q. Right. In fact, this is step 2, and, in fact, there's a
18 step 3 analysis that goes into layers of granularities, CUSIP
19 by CUSIP, correct?

20 A. Yes. So I think this would, yeah --

21 Q. And how all these spreadsheets hang together. You can go
22 from one to the other all the way down to an individual CUSIP
23 level.

24 A. Yes. I think that would be correct.

25 Q. Testing my eyesight, again, if we could go to page 2 of

1 this exhibit, which is an Excel spreadsheet, you'll see there
2 that there is a breakout by categories of various asset classes
3 and various liabilities. You see that?

4 A. Yes. I can -- well, I can see that; I'm not sure if I can
5 read it very easily.

6 Q. Okay. We'll try and expand the top left-hand quadrant of
7 the document, focusing on the financial assets. This document
8 and your earnings announcement was released just shy of five
9 months after the closing date, correct?

10 A. Yeah, about February 2009.

11 Q. And you'd had, in that time period, your PCG group working
12 feverishly to validate fair market valuations, correct?

13 A. Yes. They were going through thousands and thousands of
14 different positions to try and work out what the appropriate
15 valuation was.

16 Q. Okay. And the result of all of their labors is summarized
17 in the listing of asset values right about that subtotal,
18 correct?

19 A. Yes. I think that would be correct. As I said, I find it
20 difficult reading the detail here, but yeah.

21 Q. That number that appears there, at the end of the day when
22 all the shouting is done, for financial assets acquired in the
23 acquisition as of the acquisition date is 50.16 billion. Do
24 you see that?

25 A. Yes, I do see that.

1 Q. That's about 160 million dollars away from the number that
2 had been arrived at on the 22nd of September, almost five
3 months earlier, correct?

4 A. Yes, you're right. The number's quite similar. I seem to
5 remember a lot of big plusses and minuses, but.

6 Q. And if you look at the liabilities number, total
7 liabilities, 46.92. Do you see that? That's about half a
8 billion dollars away from the total liabilities you'd come up
9 with on the 22nd of September, correct?

10 A. Yeah. Again, there are a lot of changes in terms of the
11 underlying components. For example, you can see in
12 liabilities, you can see on bonuses, it says "cash elements".
13 So there are some other elements which didn't appear there in
14 liabilities, like share elements, bonuses. So there are quite
15 a lot of different changes.

16 Q. And I understand. There were lots of changes.

17 A. Yeah.

18 Q. You went up and down.

19 A. Yeah.

20 Q. Right. And you went back up, roughly where you started.

21 A. Yeah, a lot of changes.

22 Q. Just getting into the guts of the valuation briefly, let's
23 turn to M-102, please, Movants' 102. We're going to try and
24 expand it on the screen and see if we have it in native format
25 to save everyone's eyesight. It's on your screen, as well, I

1 believe, sir. Do you see it?

2 A. Yes, I can see it.

3 Q. I'm not going to go through line items. I just want to
4 draw your attention to a couple of the figures. Column C, line
5 14 --

6 MR. TAMBE: If you could just highlight that, please,
7 and the whole column?

8 Q. That column C is titled "BoNY value". Do you see that?

9 A. Yes, I do see that.

10 Q. Is that the Bank of New York values?

11 A. Yes, right.

12 Q. And in the total row, number 14, the number up here says
13 forty-five billion, do you see that?

14 A. Yes, I can see that.

15 Q. And then there's various adjustments and changes made to
16 that number, and two columns over, column E --

17 MR. TAMBE: And highlight that, please.

18 Q. -- that's a column titled "Market Value 9/22 With Bid
19 Offer". Do you see that?

20 A. Yes, I can see that.

21 Q. And the number that appears there on line 14 is forty
22 billion?

23 A. Yes, that's correct.

24 Q. And that is the number that then rolls up into your
25 acquisition balance sheet, correct?

1 A. Yes. So that's fair value which goes into my acquisition
2 balance sheet.

3 Q. So it's a five billion dollar difference on the non-JPM
4 securities, correct?

5 A. Between the BoNY value and that final market value, yes,
6 it looks about four and a half million dollars, you're right.

7 Q. So let's turn to Exhibit 103 and discuss what happened to
8 the JPM values.

9 MR. TAMBE: If we could just expand that, please.

10 Q. And you recognize Movants' 103, sir, as a similar
11 calculation with respect to the JPM assets, correct?

12 A. Yes. I think it's similar backing.

13 Q. And behind this spreadsheet is a CUSIP-by-CUSIP valuation?

14 A. Yes, it's a similar method.

15 Q. And this is the securities component, the cash of a
16 billion, and what ended up being, I think, a billion-two-five
17 is not included in here, correct?

18 A. Yes, okay.

19 Q. Again, drawing your attention to column D, "Portfolio
20 Totals," you'll see a number that is just shy of six billion.
21 Do you see that?

22 A. Yes.

23 Q. Right. And that's got a valua -- that has a date at the
24 top of it of 30 September. Do you see that?

25 A. Yes, that's correct.

1 Q. And as you move two columns over to column F, that's a
2 column title "MV" -- Market Value -- "with Liquidity", you see
3 that?

4 A. Yes, I can see that.

5 Q. And the number that appears there in the total line, the
6 portfolio totals line is 3.7 billion, do you see that?

7 A. Yes.

8 Q. So that's roughly a 2.2 billion dollar difference on the
9 JPM assets?

10 A. Yeah. Between the -- yeah. The first column saying "JP
11 Values" -- yeah, okay. Yes, you're right. It's a 2.2 billion
12 difference there, yes.

13 Q. And just -- that column that we were just looking at,
14 column F, doesn't have a date at the top of it. If you look at
15 column E, you will see there's a column titled "22 December
16 '08, PCG Value". Do you see that?

17 A. Yes, I can see that.

18 Q. And you understand those to be values derived by the
19 Barclays product control group effective December 22nd, 2008,
20 correct?

21 A. Yes, because my understanding is that's when we were
22 delivered the assets, so we got the assets as of that date. So
23 that's the point we valued them as of.

24 Q. You didn't value them as of September 22nd, for example?

25 A. No. We valued them at the time we got them.

1 Q. And markets had moved sharply downwards between September
2 and December, correct?

3 A. Yeah. Markets have been incredibly volatile. I think for
4 these assets, probably markets have generally moved down.

5 Q. And just to be clear as to "these assets", you recognize
6 that the majority of these assets are PMTG assets, correct?

7 A. I know the PMTG group was managing them. You can see a
8 number of these identified as things like corporate successor
9 which --

10 Q. And that's --

11 A. -- as I said before were the asset-backed securities. And
12 I think some of these -- yeah, sorry, at the bottom, you can
13 see there's a large section of PMTG assets.

14 Q. And that's Mr. King's group, correct?

15 A. That's Mr. King's group, yes.

16 Q. With respect to the assets that came over from the Fed
17 repo facility to Barclays Thursday night into Friday morning,
18 you understood, did you not, sir, that Barclays had received
19 assurances from the Fed that that collateral was available and
20 was eligible for the prime dealer credit facility?

21 A. Sorry, I wasn't really involved in those discussions with
22 the Feds, so in terms of knowing what things are eligible for,
23 I wasn't involved in any of those discussions.

24 Q. At no point in any of the work that you were doing in
25 connection with the transaction were you told that the assets

1 that we're getting as part of the Fed repo, well, we can't repo
2 them in turn. No one will refinance these assets. No one said
3 that to you, did they, sir?

4 A. I'll tell you what I can -- what I can recall is that a
5 number of those assets were carried on financing through the
6 Fed at some time. You could well be right that I may have been
7 told at some point other people couldn't finance those assets.
8 I can't recall if I was told or not that.

9 Q. And the people in finance who might know that would be
10 people like who?

11 A. I'm not sure the people in finance would know,
12 necessarily, where things could be financed. It would be more
13 to do with the treasury group who would know where the
14 financing of assets was or the operations group. The finance
15 people are more to do with the accounting and bookkeeping.

16 Q. So on the operations side, those would be people like
17 Gerry LaRocca?

18 A. Yes, that would be correct.

19 Q. And maybe David Petrie -- Petrie?

20 A. Yeah. You mentioned David Petrie earlier. I'm -- I don't
21 know if he is in operations or not. You might be correct.

22 Q. But one way or the other, you don't have any personal
23 knowledge about assurances given by the Fed to Barclays with
24 respect to financing the Fed repo assets that came over
25 Thursday night into Friday?

1 A. Yeah. I wasn't involved in those discussions.

2 MR. TAMBE: Let me just consult, Your Honor. I think
3 I'm done.

4 Thank you, Your Honor. I have no further questions.

5 THE COURT: Any questions by the other movants?

6 MR. MAGUIRE: If it pleases the Court.

7 CROSS-EXAMINATION

8 BY MR. MAGUIRE:

9 Q. Mr. Clackson, my name is Bill Maguire. I represent the
10 SIPA trustee.

11 A. Good morning.

12 Q. I understand, sir, that your colleague, Stephen King, was
13 involved in meetings with him and his team with his
14 counterparts at Lehman concerning Lehman's positions and their
15 values, is that correct?

16 A. Yes, that's correct. He was part of our team in terms of
17 negotiating to get to the fair values.

18 Q. And you weren't personally part of those -- at those
19 meetings?

20 A. No. I wasn't involved personally in any of those
21 negotiations.

22 Q. But he sent you a lot of stuff?

23 A. That's right. He was keeping me informed of what was
24 going on, the state of those negotiations.

25 Q. Is it fair to say he was in the front line?

1 A. Yes. So -- yeah. He was dealing with the Lehman traders
2 because they were the experts who understood the market and
3 understood the positions in those markets. So we had the right
4 people on our side who would be able to work out the values,
5 yes.

6 Q. And your perspective was more from the accounting
7 implications of whatever the business deal was.

8 A. Yes. So I was trying to add together all the different
9 pieces of the deal so I could understand what the accounting
10 implications for Barclays could be -- would be.

11 Q. And as the chief financial officer, you oversee Barclays'
12 accounting?

13 A. Yes, that's correct.

14 Q. And that includes accounting for various kinds of
15 securities and financial instruments?

16 A. Yes, that's correct.

17 Q. And that includes derivatives?

18 A. Yes, that's correct.

19 Q. Including exchange traded derivatives?

20 A. Yes, that's correct.

21 Q. Now, when a person has positions at an exchange,
22 derivatives positions, the exchange or the clearinghouse may
23 require that person to post collateral margins, isn't that
24 right?

25 A. Yes, that is correct.

1 Q. And that may take the form, the clearinghouse or the
2 exchange may require cash or cash-equivalents or government
3 securities or property of that nature, isn't that right?

4 A. As part of the margin payment, yes, that's correct.

5 MR. MAGUIRE: If we could put up the calendar.

6 Q. Do I understand that in the early part of the week of
7 September 15, you were here in New York?

8 A. Yes, that's correct.

9 Q. And the latter part, you were back in London?

10 A. Yes, that's correct.

11 Q. But you were still hearing some reports back there as to
12 what was going on.

13 A. Yes. I was on various conference calls and receiving e-
14 mails.

15 Q. And did there come a time, specifically on Thursday, late
16 Thursday, early Friday, when the Barclays team decided that it
17 was going to approach top Lehman executives and seek additional
18 value in the deal?

19 A. So, as I think I said yesterday, when the deal changed,
20 and we realized rather than getting long and short offsetting
21 portfolios, and we realized we paid forty-five billion in cash
22 to get a portfolio of securities from the Fed, some of which we
23 hadn't seen before, there was some work to make sure that we
24 understood all the other assets we could get in the deal and
25 any other assets -- the deal was, just going back to the

1 beginning, you may remember, we purchased a business of
2 Lehman's in North America, and we excluded various assets. So
3 we excluded things like over-the-counter derivatives in the
4 deal. And at the time, later in the week, we were trying to
5 look at the business we were acquiring and making sure that we
6 identified any other assets in the business which were within
7 the scope of what we were acquiring. So that went on in the
8 end of the week, yes.

9 Q. And specifically on Thursday night, the Barclays team was
10 trying to come up with ideas for additional assets, additional
11 values to add to the deal.

12 A. Yes. So the Barclays team were looking through the
13 business to make sure that was there anything we hadn't
14 identified earlier and to make sure that assets within the
15 scope of what we were acquiring were identified. And I think
16 they were then set out in a letter of clarification just to
17 make it clear to everyone.

18 Q. And Mr. King, Stephen King, suggested an addition to you,
19 did he not?

20 A. There were lots of conversations, so I'm -- he may have
21 suggested many things, and I'm sure he would have suggested
22 things to me.

23 Q. On Thursday night, specifically, he suggested adding
24 Lehman's margin to the deal, isn't that correct?

25 A. I can't recall exactly, but -- I don't know. I'm sure --

1 I can't recall that, but I'm -- as I said, I had conversations
2 and as I said earlier, my recollection at the time was we'd
3 done a deal purchasing the business excluding some things,
4 things like exchange traded derivatives were always in the
5 deal. So margin relating to those would always have been in
6 the deal because it wouldn't have been excluded. So Stephen
7 might have said well, we haven't valued the margin which we've
8 got as part of the deal.

9 Q. When you say it was always in the deal, sir, you have no
10 personal knowledge of that? You didn't have any negotiation or
11 discussion with anyone at Lehman about that, isn't that
12 correct?

13 A. That is completely correct. I read the asset and purchase
14 agreement, and my understanding of that agreement was we were
15 buying the business and excluding various things. The reason
16 why I'm saying it was always in the deal is I don't think that
17 was one of the exclusions which was set out.

18 Q. That's your assumption, isn't that right, sir?

19 A. From reading the documents, yes.

20 Q. That's not based on any discussion or negotiation with
21 anyone at Lehman, isn't that right?

22 A. That's correct. So I didn't have any discussion or
23 negotiation with them. But I did read the documents, so that's
24 what it's based on.

25 Q. Can you open your book, sir, at Exhibit 620? This is, at

1 the bottom, an e-mail that you received from Stephen King on
2 Thursday, September 18. Isn't that correct, sir?

3 A. Yes, that's correct.

4 Q. And Mr. King said to you, "Why don't we add to the initial
5 margin on the repos?" Do you see that?

6 A. Yes, I can see that.

7 Q. And then he sent you another e-mail shortly afterwards
8 correcting himself, and saying, "Sorry, I meant exchanges and
9 clearinghouses." You see that?

10 A. Yes, I see that.

11 Q. You understand what an exchange and a clearinghouse is,
12 isn't that right, sir?

13 A. Sorry, what was the question?

14 Q. You understand what's meant --

15 A. Yes, I do, yes, I do.

16 Q. -- by an exchange and a clearinghouse.

17 A. Yes, I do.

18 Q. That's where people buy and sell exchange-traded
19 derivatives, correct?

20 A. Yes, that's correct.

21 Q. So what Mr. King, when we look at his corrected message,
22 here, was suggesting to you was, why don't we -- you understand
23 that -- when you got this e-mail, you understood that when he
24 said "we", he was referring to Barclays, right?

25 A. Yes, that's correct.

1 Q. He was saying why don't we add margin at the exchanges and
2 clearinghouses. Isn't that right?

3 A. Yes. That's what he said. In terms of what I don't
4 understand about this is whether he's saying why don't we add
5 it to our accounting list where we're setting out the values of
6 the assets and liabilities we've acquired, or is he saying why
7 don't we add it to a deal. I don't -- but I think at the time,
8 it wasn't, as you can see, on our earlier acquisition balance
9 sheets. So I think he's saying why don't we add it to that.
10 But I don't know, exactly, which of those two he meant, and
11 you'd have to ask Stephen that.

12 Q. Did you do anything at the time to follow up on his
13 suggestion?

14 A. I probably forwarded this e-mail to someone else, asked
15 him to have a look at it, yes. But I can't recall who --

16 Q. Do you know one way or the other --

17 A. No --

18 Q. -- whether you forwarded this e-mail?

19 A. -- I can't recall what I did.

20 Q. Do you recall doing anything to follow up on this
21 suggestion?

22 A. As I said, I can't recall precisely. I suspect I did
23 because I generally, when I was getting things, was trying to
24 send them to the right people to follow up on them.

25 Q. Anything that you know?

1 A. But I can't remember precisely.

2 Q. You did respond. And you didn't shoot the idea down. You
3 said, "Agreed. Paolo is saying the right stuff." You see
4 that?

5 A. Yes, I can see that.

6 Q. Now, who's Paolo?

7 A. Paolo's Paolo Tonucci who was the Lehman treasurer at the
8 time. And I think he was one of the people we were working
9 with to try to identify unencumbered assets which were a part
10 of the business we were acquiring.

11 Q. And when you said Paolo is saying the right stuff, were
12 you communicating that Mr. Tonucci was doing everything he
13 could to assist Barclays in getting additional value into the
14 deal?

15 A. Yes. I think what Paolo was doing was helping us identify
16 the assets, which we were acquiring as part of the business.

17 Q. Did you ask Mr. Tonucci to add margin to the deal?

18 A. As I said before, I couldn't recall exactly what I did in
19 terms of sending e-mails on. I said I thought I probably did,
20 but I can't remember precisely what I did.

21 Q. You have no recollection --

22 A. That's what I said.

23 Q. -- of any communication with Mr. Tonucci on the subject of
24 margin. Isn't that correct, sir?

25 A. Yes, I said I couldn't remember precisely.

1 Q. Barclays has an audit committee?

2 A. Yes, that's correct.

3 Q. They oversee the financial function?

4 A. Yes, that's correct.

5 Q. The financial reporting of the company?

6 A. Yes, that's correct.

7 Q. It's important, is it not, that Barclays provide its audit
8 committee with reliable information?

9 A. Yes, that's correct.

10 Q. And management has a process of providing not only verbal
11 reports but also written materials to the audit committee on a
12 regular basis, isn't that correct?

13 A. That's correct, yes.

14 Q. Now, some weeks after this transaction closed, the audit
15 committee needed to be brought up to date on the transaction,
16 isn't that right?

17 A. Yes, that's correct.

18 Q. And materials were prepared for the committee, correct?

19 A. Yes, that's correct.

20 Q. Did you have a role in preparing those materials?

21 A. Yes, I would have a role.

22 Q. When you reviewed those materials, were you satisfied that
23 they were reliable?

24 A. Again, I can't recall exactly what, but normally, I have a
25 tendency to edit and change these materials as they go past me.

1 MR. MAGUIRE: Your Honor, if I might approach?

2 THE COURT: Yes.

3 THE WITNESS: Thank you.

4 Q. Sir, I provided you with Movants' Trial Exhibit 436. You
5 see that document?

6 A. Yes.

7 Q. This is a report for the board audit committee of
8 Barclays, is it not?

9 A. Yes, it is.

10 Q. Who is Chris Lucas?

11 A. He's the Barclays PLC finance director.

12 Q. And did this represent the most reliable information that
13 you had for the audit committee as of the date, 14 October
14 2008?

15 A. Yes. It would have represented the latest view we had at
16 that time.

17 Q. If you turn, sir, of the last page of the exhibit, you'll
18 see a provisional acquisition balance sheet and negative
19 goodwill calculation. Do you see that?

20 A. Yes, I can see that.

21 Q. And down the lower part of the page, you'll see a section
22 called sensitivities.

23 A. Yes.

24 Q. See that sir?

25 A. Yeah.

1 Q. It was important, was it not, to alert the members of the
2 audit committee to any conditions or contingencies associated
3 with this provisional balance sheet?

4 A. Yes, that's correct.

5 Q. And it specifically notes "all of the amounts presented
6 above are subject to finalization". Do you see that?

7 A. Yes, I can.

8 Q. And then it says, specifically, "in particular, the
9 following are of note". Do you see that, sir?

10 A. Yes, I can see that.

11 Q. Now, I invite your attention to note 2. You will see that
12 note says "the release of this deposit is subject to SEC
13 approval".

14 A. Yes, I can see that.

15 Q. And that specifically refers to an item that is the third
16 asset listed at the top of the page under financial assets,
17 specifically, cash deposit, 15 C3. See that, sir?

18 A. Yes, I can see that.

19 Q. And that was your best understanding at the time of this
20 report to the audit committee, approximately a month after the
21 closing of the transaction; isn't that correct?

22 A. Yes, it's correct.

23 Q. And this is the report that was made to Barclays' audit
24 committee on or about that date.

25 A. Yes, that's correct.

1 Q. Thank you, sir.

2 MR. MAGUIRE: No further questions.

3 THE COURT: Thank you. No questions from the
4 committee? We'll take a morning break before getting to Mr.
5 Schiller's questioning, and we'll resume at about 11:10.

6 (Recess from 10:59 a.m. until 11:14 a.m.)

7 THE COURT: Be seated, please.

8 And you may proceed, Mr. Schiller.

9 MR. SCHILLER: Thank you. Good morning, Your Honor.

10 CROSS-EXAMINATION

11 BY MR. SCHILLER:

12 Q. Good morning, Mr. Clackson.

13 MR. SCHILLER: May we distribute the thin books,
14 please? I apologize. We should have done that right now. My
15 mistake.

16 (Pause)

17 THE COURT: Thank you.

18 THE WITNESS: Thank you.

19 (Pause)

20 Q. Good morning --

21 A. Good morning.

22 Q. -- Mr. Clackson. How are you?

23 A. Good, thank you.

24 Q. In your examination earlier this morning, you were shown
25 an e-mail and asked about the success Barclays had on Friday of

1 that week, the 13th through the 22nd, in terms of the equity
2 markets turning and some gains being anticipated. Do you
3 remember that?

4 A. Yes, I remember that.

5 Q. And you had an e-mail about making a load, or something
6 like that. Do you recall that?

7 A. Yes, I recall that.

8 Q. Would you compare for the Court that aspect of the private
9 equity issue you were reviewing in the e-mail, with the early
10 morning call that you participated in, which you testified
11 yesterday with respect to being incredibly frightened about a
12 possible huge loss based on what your people were seeing in the
13 assets that were coming over Thursday night and Friday through
14 this repo?

15 A. Yeah. So as I said, the call when I was working up in the
16 middle of the night when we realized we were paying out forty-
17 five billion dollars in cash and we were getting some assets,
18 some of which we'd never seen before and we didn't know the
19 value of them, and at that point we were terrified because we
20 thought we could have a huge shortfall, as I said yesterday I
21 think. So rather than realize an accounting gain, we could
22 realize a huge accounting loss, substantially.

23 There's a huge amount of ups and downs in that period, as
24 probably I think the trail shows, that we were terrified. We
25 heard some good news, we felt a bit better, then we heard some

1 bad news. There were quite significant mood swings over that,
2 you know, twenty-four/forty-eight hour period.

3 Q. And as a result of the bad news in the morning, what did
4 your colleagues do here in New York with Lehman?

5 A. So my understanding is that they got some of the Lehman
6 people together to try and make sure they could und -- because
7 a lot of the assets we thought originally in the deal we were
8 acquiring had been encumbered. So other people who'd
9 securitize them had taken those assets away, so they were no
10 longer being able to deliver. We were trying to find, in terms
11 of the business we were buying, whether there were other
12 unencumbered assets in that business, and trying to identify
13 those unencumbered assets, to make sure that it was clear then
14 that we understood all the assets which were covered in the
15 deal of the business we were acquiring.

16 Q. And there were some securities your colleagues told you
17 they were having trouble valuing, is that correct?

18 A. There are a number of different cases where people were
19 having trouble valuing securities. Some were because, as we've
20 talked about, we did that extensive exercise earlier in the
21 week on the Monday when we went through all the securities. We
22 had new securities coming from the Fed. And it wasn't one or
23 two or three; it was, my understanding, lists of thousands of
24 securities.

25 And as I think I said earlier today or yesterday, some of

1 these were own label Lehman securities, so they were one-off
2 securities which had been manufactured by Lehman to get funding
3 and placed in the Fed. And in terms of those securities, to
4 value them you couldn't just go and find a price or see where
5 are they trading in the market. You had to do fundamental
6 analysis to try and find out what was underlying the security
7 and what value, if any, that had.

8 Q. Do you recall being told the magnitude of the issue in
9 terms of whether it was billions of dollars of concern over
10 values that Friday morning?

11 A. I can't recall any specific numbers, but my recollection
12 was the level of anxiety we had, as I said, was in the
13 billions. So it was more than wiping out any accounting gain
14 we thought we made.

15 Q. You testified earlier this morning on the subject of
16 negative goodwill, that you wanted as large a negative goodwill
17 number on your acquisition balance sheet as you could achieve.

18 A. Yes, that's correct.

19 Q. And why is that?

20 A. I suppose we wanted to realize the largest accounting gain
21 we could for our financials and because it helped our capital
22 position. And as I said earlier on, capital was an extremely
23 scarce commodity. If we had a larger accounting gain, the
24 accounting gain goes into the capital calculation.

25 Q. And did you maintain the view of wanting as large a

1 negative goodwill number through the filing of your balance
2 sheet in February of 2009?

3 A. Yes, that's correct.

4 Q. With respect to the valuation of assets, is it correct
5 that the higher the valuation of the financial assets the
6 higher the negative goodwill will be on your accounting balance
7 sheet?

8 A. Yes. Yes, that's correct, but I suppose I should say the
9 thing I said before. We don't have a choice about the value of
10 the financial assets. The accounting rules are you have to
11 value them at the fair value; so the fair market value. A
12 higher value would give you a higher goodwill, but that doesn't
13 mean we could just choose a higher value. The accounting rules
14 are pretty strict, and we went through a pretty extensive
15 process, as has been discussed earlier, to make sure we got to
16 the fair value.

17 Q. And the fair values that you got to, were those audited,
18 sir?

19 A. Yes. In our accounts we had a detailed disclosure of our
20 acquisition balance sheet and of the values of all the assets,
21 breaking down to get the gain. And there was extensive work
22 done by our auditors going through the valuation of those
23 assets to make sure that we were reflecting an appropriate fair
24 value.

25 Q. Mr. Clackson, let's turn to the subject of cure on which

1 you were examined both yesterday and then again this morning.
2 This Court has been told by Movants that it was Barclays' plan
3 to pay in the range of 200 million for assumed contracts, not
4 1.5 billion but 200 million for the assumed contracts, and that
5 Barclays knew this on the 16th of September. Is that accurate?
6 A. As I think I said earlier, we hadn't done our detailed
7 work at that point in time, so we didn't know what we were
8 going to spend. And what we knew were the estimates we had
9 received from Lehman, and I think the original estimate which I
10 remember was for 2.25 billion I think is what we knew the 16th
11 of September.

12 MR. SCHILLER: Would you put on the screen the April
13 9th transcript, at page 34, lines 24 through 34.2, please? On
14 page 33, I'm sorry, at lines 12 through 25.

15 Q. You see it says, line 12: "Now, with respect to the
16 assumed liabilities, Barclays planned on them. They insisted
17 on a discount and they planned, and the liability numbers being
18 inflated"? Do you see that?

19 A. Yes, I can see.

20 MR. SCHILLER: And now go down to line 24.

21 Q. "Now, what that indicates, it was Barclays' plan to pay in
22 the range of 200 million for assumed contracts --"

23 MR. SCHILLER: Over to the next page.

24 Q. "-- not 1.5 billion as the Court had been told, and that
25 they, Barclays, knew this on the 16th."

1 Is that accurate, sir?

2 A. No. As I've said, I don't think that is accurate, because
3 I don't think on the 16th we knew what we were going to spend.

4 Q. When you were informed of the 1.5 billion number on --
5 later on Friday the 19th, which you've testified about earlier,
6 did you have any understanding as to how Lehman derived that
7 number that it presented to the Court?

8 A. No, sir. I didn't have any understanding of how Lehman
9 derived the original number of 2.25 billion or the subsequent
10 number of the 1.5 billion.

11 Q. And I believe your testimony is that, over the weekend,
12 information started coming in?

13 A. Yes. That was my understanding.

14 Q. And the mission critical element of that, when did that
15 come in, do you know, those contracts that were needed to begin
16 the business on Monday, and continue it Saturday and Sunday
17 actually?

18 A. So my understanding is that there was a list of mission
19 critical contracts which, as I said this morning, I understood
20 had been pulled together by Lehman, because they understood the
21 business and understood what you needed to keep the lights
22 running, the computers working, et cetera. So they provided
23 that list. And I think, as I said earlier, I thought the value
24 of that list of day one mission critical contracts was about
25 200 million dollars.

1 Q. Now, you spoke earlier today about how that weekend you
2 hoped most of the vendor contracts might provide overlap, and
3 you explained to the Court that you didn't know that but that
4 you hoped that. When did you and your colleagues begin to get
5 some grasp of the contracts themselves, the Lehman contracts,
6 and how they compared to the contracts that Barclays itself had
7 with thousands of vendors?

8 A. So the work, as I said earlier, I thought started over the
9 weekend, and then we were getting notified of updates over the
10 next two or three weeks. I think the final work wasn't
11 completed till -- I think it was November at some point when we
12 had actually gone through all the contracts.

13 I think my understanding is, in the week following the
14 close when a lot of the work done (sic), clearly the work would
15 have been done looking at the larger contracts. So people
16 would have looked at the major supply contracts.

17 It's quite a complex exercise, because you have to -- I
18 may have explained this yesterday, but let me explain again.
19 You have to work out -- you have to find out what all the
20 contracts are and make sure you have the complete list of all
21 the contracts. You then have to determine which of those
22 services Barclays already has, find the contracts for the
23 Barclays service, to see if there's any duplication of the
24 service or if it's a service we need additionally. If it is a
25 service which we need to continue additionally, you then have

1 to go back and find out what the cure amount is. So there were
2 probably a lot of people working on quite an involved process
3 over a number of weeks.

4 Q. When was it that you, Mr. Clackson, had a clear sense of
5 what the cure payments would actually be?

6 A. I think, following the sixty-day period and the close --
7 so it's probably about late November -- I think I had a much
8 more accurate view. Obviously we had a number which went into
9 our financial statements which had closed during February, and
10 that was the final number we disclosed.

11 As I think I mentioned before, we did subsequently make
12 some cure payments, I think, in the region of twenty million
13 dollars or so in 2009, which we didn't include in that total.

14 Q. Was there public disclosure of the cure amounts you were
15 agreeing to take on, do you know?

16 A. No. I don't know what the disclosure was.

17 MR. SCHILLER: May I approach, Your Honor?

18 THE COURT: Yes.

19 MR. SCHILLER: Your Honor, I'm giving you Exhibit 506,
20 to which there's no objection.

21 Q. Mr. Clackson --

22 A. Thank you.

23 Q. And 506 is a snapshot of a website operated by Weil
24 Gotshal and Lehman. Have you seen this document before, Mr.
25 Clackson?

1 A. No. I haven't seen this document before.

2 Q. Let me ask you to turn to the fourth page. And, I
3 apologize, this is not Bates-stamped. You see the top of this
4 page of the website it refers to, and I quote, "The deadline to
5 a written objection concerning designated contracts was Monday,
6 October 27th at 4 p.m."? And then it has a series of entries:
7 "On October 21st, purchaser filed an additional notice of
8 assumption and assignment of executory contracts and unexpired
9 leases."

10 MR. TAMBE: Objection, Your Honor. I have no
11 objection to the document, but I do have an objection to the
12 competence of this witness to testify about it.

13 THE COURT: I think that's a fair objection. This is
14 a snapshot of a publicly available website which is designed to
15 provide transparency into the case. To the extent that the
16 witness knows the substance of something which is within it
17 because of his personal knowledge, it's obviously fair game for
18 questioning. But he has no particular ability to comment on
19 the formatting of the document, the substance of the document,
20 or anything about the document, any more than Mr. Schiller
21 does.

22 MR. SCHILLER: And I'm not about to testify.

23 Q. Why don't you put that aside for the moment and just tell
24 the Court whether you reached decisions periodically from
25 September 22nd through November as to which contracts were

1 being taken on and assumed.

2 A. Yeah. So as I said, I think there was a significant
3 amount of work done, and the people doing that work will have
4 got to a point where they decided, you know, which contract to
5 assume.

6 Q. And did you have a team that worked on this process?

7 A. Yeah. There was a team of people in New York working on
8 this.

9 Q. And it took them months, is that right?

10 A. That was my understanding, yes.

11 Q. Let me ask you to turn to tab 6 in the binder that we
12 handed out.

13 MR. SCHILLER: Your Honor, that's Exhibit 774. It's
14 in evidence.

15 Q. You were asked about this document this morning, Mr.
16 Clackson. You see the date September 22nd and the time? This
17 is probably Sunday night for you in London, is that correct?

18 A. I think this was -- yeah, from Gary in New York. He sent
19 it, I think -- yeah, it must have been about 11 o'clock New --
20 11 p.m. New York time. So it would have been, yeah, early
21 morning in London.

22 Q. And may I ask you to address your attention to the next
23 page, the attachment in Exhibit 774? And you see the -- where
24 it says "total assets"?

25 A. Yes.

1 Q. And there's a reference to cure payment and the 2.25
2 number?

3 A. Yes.

4 Q. And then the bonus accrual and the 2.00 number?

5 A. Yes, I can see that.

6 Q. And who prepared this document for you?

7 A. So this would have been prepared by Gary Romain.

8 Q. And does this reflect certainty or uncertainty as to the
9 cure payment situation as of Sunday night?

10 A. I mean, Gary would have been pulling together the latest
11 information he had. I think, if you look at the bottom of the
12 exhibit --

13 Q. Yes, sir, the footnotes -- the notes?

14 A. Yeah, so the -- sorry, the notes down at the bottom. He's
15 saying here he's just assuming the full cure payment required.
16 My assumption is that at the time he had no better information
17 than that.

18 Given the timing of this document was -- I think I may
19 have said this before, but the timing was on Sunday night --
20 obviously Gary's information here is it's out of date. We know
21 because we know that a number of 1.5 billion was presented to
22 the Court on the Friday. So obviously, the data he had is from
23 sometime before that.

24 Q. So he was making an assumption and he lacked any more
25 precise information than that himself --

1 A. Yes.

2 Q. -- that evening?

3 A. Yes.

4 Q. Let me ask you to turn to the next tab, 7, which is
5 Exhibit 775.

6 MR. SCHILLER: And that is in evidence, Your Honor.

7 Q. Would you identify 775, another Gary Romain e-mail to you
8 and others, Mr. Clackson?

9 A. Yes. This is the same draft acquisition balance sheet
10 which Gary sent. This is nearly a day later, so it's Monday
11 night now.

12 Q. And it's a day later, and Mr. Romain is saying to you and
13 Mr. Ricci and Mr. James, who you've identified to the Court
14 already in your testimony --

15 A. Sorry. It's Mr. Walker, actually. It's Mr. James Walker.

16 Q. James Walker? "Please find the latest acquisition balance
17 sheet and negative goodwill calculation. In addition to the
18 general verification and the valuation of trading positions,
19 additional moving parts include," and your second bullet there
20 is "The appropriate cure payment accrual requires further
21 attention." And this following the closing that day in New
22 York, is that right?

23 A. Yes, that's correct. This is the evening of that day.

24 Q. So in the twenty-four hours -- or the twenty hours that
25 have passed between Exhibit 774 and Exhibit 775, has your

1 calculation of cure changed based on your information?

2 A. I think if you go on to the next page, the attachment, and
3 you go to the same piece below Total Assets --

4 Q. You're referring, in the "Total Assets" section, to where
5 cure payment appears?

6 A. Yes. There's an amount here, if you can see, NOR, .8
7 billion, or 800 million dollars. And so there was quite a
8 change between this and the day before. And I think my
9 understanding is, as I said, we're getting some over the
10 weekend. So as opposed to the Lehman estimate, which we had in
11 earlier, this number of 800 million I think related to, you
12 know, some bottom-up data. So some underlying contract or data
13 we've got. But you can see in terms of note 4 --

14 Q. Footnote 4, yes.

15 A. Footnote 4. -- "Details OS". "OS" means outstanding. So
16 he still didn't have any detailed backup supporting that
17 number. And Betty Wang, who worked in Barclays Capital Finance
18 in New York, was following up in terms of -- I presume,
19 following up to try and make sure we got the detail supporting
20 that number.

21 Q. So as of Monday night, after the closing, you had an 800
22 million estimate, but there were still outstanding details in
23 terms of information that you needed to pursue this cure issue?

24 A. Yes, that's correct.

25 Q. And that took how long?

1 A. As I said, I didn't think we completed the process until
2 November time. So that's, whatever, a month and a half, six
3 weeks from here.

4 Q. Let me ask you to turn to tab 8, which is Barclays'
5 Exhibit 776. And this is another draft of the acquisition
6 balance sheet from Gary Romain dated -- it's from you,
7 actually. Why don't you identify the document dated September
8 25th for the Court, please?

9 A. Sorry. I was forwarding to Mr. Abraham a latest version
10 of the acquisition balance sheet, which I think you can see
11 below was sent to me by Gary Romain.

12 Q. And so this is several days later. And if you look at
13 that sheet and turn to the total assets in the attached balance
14 sheet, you have now another number, don't you? And would you
15 describe that to the Court, and note 4 as well?

16 A. Yeah. So at this point the estimate of the cure payment
17 was, NOR, .5 billion, or 500 million. And footnote 4, you can
18 see, says in this case 500 million total cure payment list is
19 included. So, obviously, at this point we did have some
20 detailed backup supporting the number.

21 But you can see that it was an initial estimate, which it
22 said at the bottom, and we still hadn't completed the work at
23 this point. And you can also see that it says the finance
24 people were still following up on the detail.

25 Q. So it was initial estimate -- an initial estimate. It had

1 gone from 800 to 500 million. There was still more to do, is
2 that right --

3 A. Yes, that's correct.

4 Q. -- as of September 25th? You were shown earlier this
5 morning Movants' Exhibit 95, which is also on the September
6 25th e-mail concerning cure payments. And on the second page
7 of that there is an e-mail from Gary Romain dated September
8 25th to Mr. Westwood, and you were asked about that.

9 Let me point out to you in the second sentence it says,
10 "In the balance sheet we need to make provisions for the cure
11 payments we actually expect to make." You hadn't arrived at
12 that expectation at that point?

13 A. Yes, that's correct. We hadn't arrived at that
14 expectation.

15 Q. You say, "plus, that the related suppliers would expect us
16 to make". You see that?

17 A. Yes, I can see that.

18 Q. To what do you refer there, for the Court's information?

19 A. (No audible response).

20 Q. And I say "you" because --

21 A. Sorry.

22 Q. -- he's reporting on Patrick Clackson's comment. So I
23 realize this is just in substance what you may have conveyed to
24 Gary Romain.

25 A. I think by that time -- so later in the week when we

1 discussed with auditors how we were going to account for cure,
2 which, as I said I think yesterday, was a new concept to us.
3 And it wasn't clear to us exactly how to account for it. You
4 can see at that point we said, in terms of the acquisition
5 balance sheet -- we come to the view at this point that we
6 needed to make provision for the cure payments in the
7 acquisition balance sheet which, you may recall, the week
8 before this, we didn't believe that we'd have to make provision
9 for those payments in the acquisition balance sheet. So that's
10 what I understood this to mean.

11 Q. And the next sentence says, "This would seem a significant
12 exercise to complete in detail. I've seen the listing and
13 understand how long it is, but we are trying to make an initial
14 estimate today, if at all possible."

15 Was that your view? Did you share that with Mr. Romain on
16 or about September 25th?

17 A. I can't remember if that was my view or Gary's, but I
18 think it's consistent with my understanding that it was a huge
19 long list and a lot of work to do. But the thing I was trying
20 to get was an initial estimate so I had a view of our position.

21 Q. You just mentioned that the cure payments were back on the
22 acquisition balance sheet by this point in the transaction --

23 A. Yes.

24 Q. -- after closing. Let me take you back to what my friend
25 refers to as the first transaction proceeding Monday and

1 Tuesday, the 15th and 16th of September, because I would like
2 you to review that again with the Court.

3 MR. SCHILLER: And I would ask that you look at
4 Exhibit 135, which is tab 3, Your Honor, in the little book we
5 have in front of you.

6 THE COURT: Just so we're clear on our terms --

7 MR. SCHILLER: Yes, sir.

8 THE COURT: -- I thought that the first transaction
9 was over the weekend or pre-bankruptcy, the second transaction
10 was the 15th and 16th, and the third transaction is the one
11 that was actually closed on the 22nd. So to the extent that
12 your question includes an incorrect reference to --

13 MR. SCHILLER: Thank you, Judge.

14 THE COURT: -- the movants' use of the term, I think
15 it needs to be amended.

16 MR. SCHILLER: Right. Right. Thank you. Let me
17 rephrase the question.

18 Q. Referring to the transaction you were at work on Monday
19 and Tuesday, the 15th and 16th, and which was presented to the
20 Court in terms of its progress on the 17th, that is what I am
21 referring to when I ask you to look at Exhibit 135.

22 And at the bottom of that page, on the first page, you see
23 there is an e-mail from you to Bill Castell?

24 A. Yes, I can see that.

25 Q. Now, does this document show a negative goodwill

1 calculation assuming what Barclays would spend on cure, that it
2 would spend 200 million or less on cure?

3 A. No. This document -- sorry, bounce around here. This
4 calculation had nothing to do with spend in terms of spend on
5 cure. It was a calculation of what we thought the accounting
6 liability we would have to recognize in respect of, in this
7 case, both cure and compensation would be. But -- which is
8 distinct from spend. So at the time, I think as I said
9 yesterday, looking at cure in isolation, we didn't have any
10 more information than the 2.25 estimate which we got from
11 Lehman. We didn't have any knowledge of the bottom-up list of
12 contracts. So we didn't know anything about what we were going
13 to spend.

14 But for accounting purposes, at that point, because in the
15 contract we thought the wording appeared to be optional on a
16 supplier, we didn't think that we'd recognize any accounting
17 liability in respect of cure.

18 So in terms of that calculation, the accounting liability
19 doesn't include anything in respect of cure, but that was --
20 had nothing to do with how much we expected to spend, 2.25
21 billion, or I think you mentioned 200 million. I don't quite
22 understand how that fits in. But we had no knowledge of what
23 we were going to spend.

24 Q. Others have objected to my questions from time to time,
25 and you should feel free to do that too. If we look at the

1 first line of that e-mail to Bill, you said here, Mr. Clackson,
2 it's a Long Island side, LI side, not BarCap, in terms of where
3 this information comes from; do you see that?

4 A. Yes, that's correct. I -- sorry. Yes, I can see that.

5 Q. So you're relying on their estimate at that point, as
6 you've mentioned?

7 A. Yes.

8 Q. And now you have this accounting liability issue. You've
9 taken the cure, as I think you explained to the Court
10 yesterday, the 2.25, completely off the acquisition balance
11 sheet and over in the direction of your profit and loss to be
12 charged as these contracts are assumed and paid, is that right?

13 A. Yeah. So that was my understanding at the time that, as
14 we did the work on cure and worked out the payments we'd have
15 to make, those would be charged against our accounting results
16 subsequent to the acquisition.

17 Q. And the 1.35, once again for me and for His Honor, what
18 does that refer to in terms of the comp? What are you moving
19 off of the acquisition balance sheet in terms of comp and over
20 toward your profit and loss statement?

21 A. So the estimate we had for comp there was number 2 in that
22 formula. So I think we had an estimate that we were going to
23 pay two billion dollars. And in terms of what accounting
24 liability we'd reflect in the opening balance sheet or the
25 completion balance sheet, at the time we thought we would only

1 reflect accounting liability for bonuses, where we had a name-
2 by-name list of the bonuses we were going to guarantee to
3 individuals.

4 So of that two billion, the 1.35 was the amount where I
5 thought we had a name-by-name list. The balance, the 650
6 million dollars balance, I think as I said yesterday, was money
7 which we're expected to spend for the other individuals who
8 were taking on the other of the 10,000 people we were taking
9 on. We didn't know how many of those we would keep or whether
10 they would go, and so we didn't know whether that conversation
11 on liability related to bonus or severance.

12 Q. If this Court were told that that 1.35 number is the
13 amount that Barclays is planning to spend on comp and cure,
14 would that have been accurate?

15 A. No. That wasn't my understanding at the time. As I said,
16 the 1.35 is a subset of the amounts which were guaranteed. I
17 didn't have any better data from my human resources people
18 other than the two billion dollar estimate at that time.

19 MR. SCHILLER: May we look at the April 9 transcript
20 at page 35, lines 6 through 10, please?

21 Q. Mr. Clackson, please look with me at this section of the
22 transcript. It refers to what the Court has been told, and it
23 says -- this is Lehman's balance sheet and it gives the final
24 asset split. And this is what Mr. Clackson writes," referring
25 to this e-mail:

1 "Negative goodwill from this method is the sum of 2.25
2 plus 2, which comes to 4.25, minus 1.35. That's the amount
3 Barclays is planning to spend."

4 Is that accurate, sir?

5 Q. No, I think this is a misreading of a document, because
6 1.35, I think as I've just said, isn't the amount we plan to
7 spend; 1.35 was the accounting liability which we thought we
8 would have to reflect in our opening balance sheet. And as I
9 said earlier, we didn't know how much we were going to spend in
10 terms of a cure.

11 Q. Let me show you Movants' 2, if I may. You were -- had
12 been asked about that.

13 MR. SCHILLER: That is in evidence, as you know, Your
14 Honor.

15 Q. Now, if you look at the cure payment set forth on this
16 piece of paper there, and you say -- this isn't your balance
17 sheet, but what you've described from your U.K. accounting --

18 A. Sorry. What's the date of --

19 Q. This is --

20 A. I --

21 Q. -- 9/16/08, handwritten at the top of the page. Do you
22 see that?

23 A. Okay, yes, I could see that.

24 Q. And I'm pointing down to the 2.25 number on cure that
25 appears on this document, and it is in a balance sheet setting

1 of assets and liabilities in the transaction, some of them.
2 And there's, here, the 2.25 number that you've been testifying
3 about. And if you were to move that number from your
4 acquisition balance sheet to a profit and loss accounting, it
5 would not be part of an asset and liabilities comparison,
6 correct?

7 A. Yes, that's correct. So if it was charged through our
8 profit and loss statement, it means we wouldn't on day one have
9 to recognize a liability. So we're saying on day one we
10 wouldn't recognize a liability, but we would recognize a
11 liability as we settled with the customers. And at the time
12 you recognize a liability, there would be a charge which would
13 go through our profit and loss account. So that was our
14 understanding of how we would treat that.

15 Q. And in terms of the comp number, which appears there as
16 two billion, you explained to the Court that a portion of that
17 would also be moved off your acquisition balance sheet at that
18 point in the transaction. Also on a charged basis under P&L?

19 A. Yeah. So we thought, because we didn't have at the time,
20 you know, a detailed list of either the -- for the 650 million,
21 we didn't think it would appear as a liability because we
22 didn't know who would end up getting severance or who would end
23 up getting bonus or how much. We didn't think that we could
24 show that as a liability on day one.

25 And so we would have to accrue those charges either as

1 they arose or, you know, during the relevant period for the
2 rest of the year. That was our understanding.

3 Q. And so if 650 or 700 million were also taken off this
4 sheet of paper as it was for you on your acquisition balance
5 sheet, how would the total financial assets compare to the
6 total financial liabilities?

7 A. So the assets would obviously exceed, in this case for
8 liabilities, by the amount you took off. So if you took of
9 2.25 and 650, there would be -- the assets would be 2.9 billion
10 greater for the liabilities, which means, for accounting
11 purposes, on that day one acquisition balance sheet you would
12 realize a negative goodwill gain, which is effectively what my
13 earlier e-mail described.

14 Q. And that would be an acquisition accounting gain based on
15 the numbers you've just described, a buffer between the assets
16 and the liabilities as one basis for that?

17 MR. SCHILLER: I withdraw the question.

18 THE WITNESS: Yeah.

19 Q. The -- in terms of the two billion dollar comp liability,
20 Mr. Clackson, I want to be clear. I'd like the Court to
21 understand your view as to what comprised that two billion at
22 the time this transaction closed. Did that mean to you two
23 billion in bonuses, or were there other elements to the two
24 billion dollars?

25 A. My understanding was we were taking on compensation

1 liabilities for the 10,000 or so employees we're taking on. A
2 portion of that, as I've said before, comprised bonuses which
3 have been fixed. There was a portion where we didn't know
4 whether people would receive severance payments or bonuses, and
5 therefore my understanding was that included both bonus,
6 severances and any related payroll taxes on those amounts.

7 Q. So if the Court were told -- Mr. Clackson, if His Honor
8 was told by movants that Barclays had signed and realized that
9 it expressly mandatorily makes Barclays responsible to pay two
10 billion for bonuses, would that be complete or incomplete?

11 MR. TAMBE: Objection, Your Honor. It calls in part
12 for legal -- for a legal conclusion, because he's being asked
13 to compare that representation with what the contract may or
14 may not require Barclays to do. I don't think he's competent
15 to testify to that.

16 THE COURT: I'm going to sustain the objection for the
17 reasons stated and for another reason, because it's a question
18 that ties into a hypothetical representation to the Court. If
19 you ask it as a purely factual matter without the reference to
20 the representation, I think it's a better question. And I also
21 think that this witness is not in a position in terms of
22 representations to the Court. He's only in a position to talk
23 about what he knows about comp and cure. That's it.

24 MR. SCHILLER: Thank you, Judge. And he has testified
25 as to that, so I'm not going to go over that again with him.

1 THE COURT: Okay.

2 MR. SCHILLER: I think it's important, at least it is
3 to us, that the trier of fact see what has been alleged
4 compared to what his evidence is, and I tried to dramatize that
5 for you. I won't do that again, Judge.

6 THE COURT: No, it's okay. You can be as dramatic as
7 you like.

8 BY MR. SCHILLER:

9 **Q. I'd like to return to Exhibit 110.**

10 MR. SCHILLER: And I have to distribute that, with the
11 Court's permission. May I approach?

12 THE COURT: Sure.

13 (Pause)

14 MR. SCHILLER: Your Honor, this is an unobjected to
15 exhibit of a Barclays public announcement on the 17th of
16 September, 2008.

17 **Q. Do you see that --**

18 **A. Yes, I --**

19 **Q. -- Mr. Clackson?**

20 **A. -- see that.**

21 **Q. And it references John Varley and his address. Can you**
22 **describe to the Court, if you recall, what Mr. Varley was**
23 **describing that morning and generally to whom?**

24 **A. Mr. --**

25 MR. TAMBE: Your Honor, I'm not sure foundation was

1 laid as to this witness' knowledge about this presentation.

2 Q. Are you familiar with this announcement in Exhibit 110,
3 Mr. Varley (sic).

4 MR. TAMBE: Mr. Clackson.

5 MR. SCHILLER: Mr. Clackson, yeah.

6 THE COURT: I'm not familiar with it at all. I'm
7 about to be. If there's a foundation objection, the foundation
8 objection is granted. Lay your foundation and we'll proceed.

9 MR. SCHILLER: Okay. Thank you, Judge. I'm sorry.
10 Didn't mean to interrupt.

11 A. Yes. No --

12 Q. Did you contribute any data to Mr. Varley's remarks that
13 day?

14 A. Yeah, we would have -- my team and myself contributed all
15 the financial data which went into his announcement to the
16 market.

17 Q. May I ask you to turn to the second page of Mr. Varley's
18 announcement to the market on September 17th, two days before
19 the hearing before His Honor? And turn to the third paragraph,
20 the second sentence, in which Mr. Varley says "We are acquiring
21 trading assets with a current value estimated" -- "a current
22 estimated value of seventy-two billion dollars and trading
23 liabilities with a current estimated value of sixty-eight
24 billion dollars for a cash consideration of 250 million
25 dollars."

1 Did you provide that information to Mr. Varley?

2 A. Yeah, so that's the information we would have given him.

3 Q. And two paragraphs below, it says "We also mentioned in
4 our announcement today that certain of our shareholders have
5 expressed support for the transaction and an interest in
6 increasing their share holdings in Barclays. In fact, the
7 transaction is capital ratio accretive without additional
8 equity issuance. And the source of that accretion is the
9 negative goodwill from the transaction which amounts to about
10 two billion U.S. dollars."

11 Did you provide the data for Mr. Var -- to Mr. Varley for
12 this public statement?

13 A. Yeah. So again, we'd have provided that data. Me and my
14 team would have provided that data.

15 Q. You were asked earlier this morning about a 75.3 billion
16 dollar number in Barclays' board deck. Do you recall that?

17 A. Umm --

18 Q. Let me help you --

19 A. Yeah, I'm not sure --

20 Q. -- by asking you to turn to Exhibit M-6 in their binder.

21 (Pause)

22 Q. And please turn to page 5, which was the page that you
23 were examined about, and it's headed "Total Assets and New
24 Transaction are Seventy-Five Billion Dollars." Do you see
25 that?

1 A. Yes, I can see that.

2 Q. And on the very first line there's an entry for mortgages.
3 What is that, the new transaction included entry, 6.5 billion?

4 A. I think it would be related to mortgage-backed securities.

5 Q. And are those the resis, or the residential -- the real
6 estate mortgage securities?

7 A. Yes. If you look at the right-hand side it breaks out
8 that it's -- yeah, there'd be real estate mortgage securities
9 and other ABS products, you can see, which we've done for
10 asset-backed securities.

11 Q. So here in this exhibit, the seventy-five billion is made
12 up in part of 6.5 billion for residential real estate mortgage
13 securities. Is that how you read it?

14 A. Yes. That's how I read this.

15 Q. And now let me ask you to hold your finger on that, but
16 turn to M-1, which is tab 1 in the binder you received, and to
17 page 6, which has that definition of purchased assets. And at
18 subparagraph (d), it specifically describes the long positions.
19 The long positions are described as government securities,
20 commercial paper, corporate debt, corporate equity, exchange-
21 traded derivatives, and collateralized short-term agreements,
22 with a book value of approximately seventy billion. Do you see
23 that?

24 A. Yes, I can see that.

25 Q. Does the description of these long positions on page 6

1 include residential estate mortgage securities?

2 A. No. I don't think it does. I think you can -- that I
3 include it separately from this.

4 Q. Is it treated separately in the next paragraph?

5 A. Yes, it is.

6 Q. Subparagraph (e) which reads, "Fifty percent of each
7 position in the residential real estate mortgage securities"?

8 A. Yeah. So that sets it out separately from the other
9 positions.

10 Q. But there's no value for that listed in the APA, is there?

11 A. No, there isn't.

12 Q. But if you were to include this 6.5 billion number that
13 appears as a new transaction included for this mortgage
14 subject, in M-6, and added that, you would have a 76.5 billion
15 dollar number, would you not? Added that to the seventy?

16 A. Yes, that's correct. If you added the seventy to the six
17 and a half, you have seventy-six and a half billion.

18 Q. And if you excluded the -- keeping your finger on the page
19 with the mortgage-backed securities listed, if you wear to
20 exclude the 6.5 billion of residential real estate mortgages
21 from the 75.3 total, on that page, does that leave
22 approximately seventy billion of securities?

23 A. Yeah or sixty-nine billion it would be. Yes.

24 Q. And are the remaining seventy billion of securities on
25 this page, sir, of Movants' Exhibit 6, the New Transaction

1 Included, are the approximately seventy billion dollars of the
2 securities in the remaining categories the types of securities
3 also listed in the APA definition of long positions that we
4 just looked at? In Tab 1, of the APA.

5 A. Yes, I do think they're consistent break downs, so in line
6 with -- yes, the purchase assets.

7 MR. SCHILLER: I'm going to want to get an exhibit
8 number, Your Honor.

9 THE COURT: All right.

10 MR. SCHILLER: What is the exhibit number?

11 Q. Earlier in your examination you were showed a document
12 showing net asset and funding estimates, which mentions a
13 negotiated discount of five billion dollars. Do you recall
14 that?

15 A. I've been shown so many documents, I'm -- it would be
16 helpful if you could direct me to the document just so I know
17 I'm talking about the appropriate one.

18 Q. I don't have that handy. Let me see if the examination's
19 finished.

20 MR. SCHILLER: That concludes my cross, thank you.

21 THE COURT: Okay.

22 MR. TAMBE: If I could have one minute, I think I'll
23 have five minutes of questions and that's --

24 THE COURT: We'll have a moment of silence.

25 REDIRECT EXAMINATION

1 BY MR. TAMBE:

2 Q. Mr. Clackson, just a couple of questions. One is just a
3 calendar issue, because maybe I'm confused on my calendar.

4 Could you put up the September calendar, please? Friday the
5 19th of September was a Friday, correct?

6 A. Yes, that's correct.

7 Q. Not the weekend and you understood there was a hearing
8 before this Court on the 19th, correct?

9 A. That was my understanding, yes.

10 Q. Okay. If you could pull up Exhibit M-41, please? The
11 e-mail that you write to Mr. Rich Ricci is on Friday, September
12 19th at 3 p.m., do you see that?

13 A. Yes, I can see that.

14 Q. And that -- and so it's not on the weekend, it's on the
15 Friday that the hearing is being held, correct?

16 A. Yes, that's correct.

17 Q. And that's where you express your statement, "Cure
18 payments are optional and though some will be incurred, most
19 will be covered by our ongoing supply relationships and fall
20 into motley expenses," correct?

21 A. Yes, though I think as I said earlier that was my hope
22 that that is what would happen.

23 Q. And in terms of your hopes and aspirations with respect to
24 cure, you walked through a whole series of acquisition balance
25 sheet drafts where the number went from 2.25 to 1 to 800 to 500

1 and ultimately you ended up with 220 million, correct?

2 A. Yes, that's correct.

3 Q. Your hopes were right? They were achieved?

4 A. That was --

5 Q. Came full circle back to where you thought you would be on
6 Friday?

7 A. On the Friday, I had no knowledge of where we would be and
8 I don't -- you know, we ended up at 238. I don't think I ever
9 expressed a number on the Friday of where we would be.

10 Q. No, you did not express a number. If you could turn to
11 Exhibit -- that was handed to you by your counsel, BCI Exhibit
12 110, which is the earnings of analyst call tran -- from the
13 looks of it. Do you have that before you? I think it was a
14 loose document.

15 A. Yes, I have that.

16 Q. And you testified that you did provide some of the data
17 that was used by Mr. Varley, the group Barclays PLC chief
18 executive --

19 A. Right, that's correct.

20 Q. -- in addressing the masses, the investors?

21 A. That's correct.

22 Q. Like an important call?

23 A. Yes, that's correct.

24 Q. Like, you want to make sure your chief executive when he
25 gets up there and talks to the investor base is absolutely one

1 hundred percent accurate, right?

2 A. Yes, that's correct.

3 Q. Can't mess up?

4 A. Based on the data we have of that time, yes, sir.

5 Q. Can't owe a promise. Can't owe a promise, right?

6 A. Yeah. I mean, we want to make sure he had good data for
7 that call, yes.

8 Q. You're making a significant announcement -- Barclays is
9 making a significant announcement in the middle of a tumultuous
10 week, correct? You were being very careful with the date that
11 you give Mr. Varley, correct?

12 A. Yes, that's correct.

13 Q. Let's look at some of the statements that Mr. Varley makes
14 and you can tell us whether you provided any information to
15 back those up. At the bottom of page 1 of Exhibit 110 he
16 states: "The knowledge that the opportunity might arise also
17 caused us to manage our exposures to Lehman Brothers and we
18 have minimum exposure arising out of the bankruptcy."

19 Did you provide any data to Mr. Varley in support of that
20 statement?

21 A. I can't remember, it's -- personally providing him data,
22 but in terms of the -- the transaction, I set out an agreement.
23 Obviously, we did what we did to make sure that we didn't have
24 exposure to things like OTC contracts which would be -- link us
25 in to the whole Lehman bankruptcy process because that sort of

1 master agreements would cross over to Lehman, so, yes, I was
2 involved in the work to make sure that we didn't have those
3 sort of exposures.

4 Q. And therefore you would agree with Mr. Varley's statement
5 there, that "we have minimum exposure arising out of the
6 bankruptcy"?

7 A. And -- and --

8 Q. DO you agree, sir?

9 A. Out -- arising out of the bankruptcy, yes, I agree. We
10 had --

11 Q. Turn to the next page.

12 A. -- from that.

13 Q. And the first paragraph at the top of the page. So he
14 states there to the assembled masses, the investors: "We knew
15 from that work over the summer that there was a significant
16 value opportunity in the business and we knew that there might
17 be a good economic opportunity available to us." Do you see
18 that?

19 A. Yes, I do.

20 Q. And based on what you know, anything wrong with what Mr.
21 Varley has said that?

22 A. Yes, so the work we did previously in the summer was when
23 we had looked at Lehman Brothers, the whole firm globally as a
24 potential acquisition and we looked at the synergy between the
25 Lehman business and the Barclays business. So that's what this

1 was based on.

2 Q. Okay. So in addition to what we've called Lehman 1, the
3 weekend exercise, there was a summer exercise looking into
4 Lehman?

5 A. There -- there was a desktop review so there was no
6 more --

7 Q. What type of review, sir?

8 A. A desktop review, so we got Lehman's financials, details
9 of their businesses and tried to compare them with ours and see
10 where there were overlaps, et cetera.

11 Q. And then Mr. Varley goes on to say, "Furthermore, we
12 satisfied ourselves in the due diligence process which took
13 place at the back end of last week and over the weekend. But
14 the franchise of much of Lehman's and in particular the U.S.
15 Broker Dealer business, remains strong and healthy." Do you
16 see that?

17 A. Yes, I do.

18 Q. And did you provide any data to Mr. Varley in support of
19 that statement?

20 A. I can't remember any specific data I supplied to Mr.
21 Varley --

22 Q. And you don't disagree with the expression that Mr. Varley
23 makes in that statement, that much of Lehman's and in
24 particular the U.S. broker-dealer business remains strong and
25 healthy, do you, sir?

1 A. No. Much of the franchise was strong and healthy, that's
2 correct.

3 Q. If you could turn further on in the -- in this transcript
4 where your chief executive is speaking to investors, page 7 of
5 18. And for your benefit, you may want to read the question
6 that Mr. John Varley is responding to, which is on page 6 of
7 18. There's a question from someone at MF Global and you can
8 read that to yourself and then we'll discuss Mr. Varley's
9 answer.

10 (Pause)

11 Q. And in particular, I want to draw your attention to the
12 last sentence there, where Mr. Mon (ph.) from MF Global asks,
13 "They're our own bank positions in the forty billion that you
14 have acquired and you are just telling they are perfectly,
15 adequately marked. Is that right?" See that?

16 A. Yes, I do.

17 Q. That's the question and then Mr. Varley answers that,
18 right? On the next page.

19 A. Yes.

20 Q. And he says, "I will ask Chris to comment on the detail."
21 That's Chris Lucas, your group PLC CFO, if I --

22 A. Yes, that's correct.

23 Q. But Mr. Varley goes on to provide an answer, do you see
24 that?

25 A. Yes.

1 Q. And he says, "I suppose what I would say to you that you
2 know there's no coincidence in this transaction if you see what
3 I mean. We have had the circumstances in which we have been
4 able to execute the transaction mean that we have been able to
5 be very deliberate either pro or con, so there isn't
6 serendipity or coincidence in the transaction; the transaction
7 is structured as we wanted it to be. It is, of course, subject
8 to court approval and we are respectful of the Court. But we
9 have been very deliberate in our choices here." Do you see
10 that?

11 A. Yes, I can see that.

12 Q. And you disagree with any sentiment expressed by Mr.
13 Varley in his address to investors on that day?

14 A. No, because I think in your terminology, this was, you
15 know, referring to -- I think you call the Lehman 2
16 transaction, where we had gone through, as you know, this
17 extensive exercise of making sure we got to the right fair
18 value for all the positions we were taking on. And we'd also
19 gone through quite a lot of detail to make sure, in terms of
20 acquiring business, we were excluding things which we thought
21 linked us back to the Leman bankruptcy or the rest of Lehman.

22 Q. Right. You don't recall Mr. Varley taking to the
23 airwaves, with respect to Lehman 3, do you?

24 A. No, I --

25 Q. There was no other address to investors?

1 A. Well, but the timing of this address, I think, is at the
2 time we thought the Lehman 2 transaction was going to happen
3 and I think as I said earlier, in that case we were able to
4 look at all the positions, go through the exercise of marking
5 the positions, so that's obviously what John is referring to
6 here.

7 Q. And then, at least with respect to Lehman 2 what you're
8 saying is, "John's got it right."

9 A. He has got it right, yes.

10 Q. And further down there's another question and answer on
11 page 7 of 18. And you can read the question to yourself, but
12 I'm going to focus on the answer. Let me know when you're done
13 reading the question, sir.

14 And Mr. Varley says, "Your group chief executive says,
15 'This is -- and that is because we have not taken the entire
16 balance sheet that creates that income. What we have taken is
17 a portfolio trading assets and liabilities that are first of
18 all, all'" --

19 A. I think I might have read the wrong question. I read the
20 one on the bottom of page 7.

21 Q. No. It's actually just the next question down. It's over
22 here.

23 A. On page 8?

24 Q. Yeah, it's titled "Further Questions". I guess by Mr. Mon
25 again, from MF Global, just going back to the earlier question.

1 Do you see that? Do you have the right question, sir?

2 A. Sorry, page -- on 8. I can't see anything saying --

3 Q. Page 7 of 18.

4 A. Oh, okay, sorry. At the top of this page. Sorry. I was
5 looking at the bottom. Yes, I see that.

6 Q. I'll give you a moment. Do you want to read that first
7 question at the top of the page, it's below the heading Further
8 Question.

9 A. Yes, I can see that.

10 Q. And a response to that further question from Mr. Mon, what
11 John Varley says is, "And that is because we have not taken the
12 entire balance sheet that creates that income. What we have
13 taken is a portfolio of trading assets and liabilities that are
14 first of all, the risk and secondly, those that need to support
15 the ongoing parts of the business that we have acquired. And
16 therefore they are predominantly market making assets and
17 liabilities and very tradable." Do you see that?

18 A. Yes, I do.

19 Q. And had you provided any data or information to Mr. Varley
20 in support of that statement?

21 A. Again, I think this relates to the Lehman 1 transaction
22 which is the transaction we had at that time --

23 Q. I think you mean Lehman 2, sir.

24 A. Sorry, Lehman 2. You're right. Thank you. And what
25 we've been through and looked at the details on that, yes. I'm

1 not sure if I would have said it quite so strongly, but
2 obviously I'm an accountant rather than a chief executive,
3 but --

4 Q. Do you think he got it wrong?

5 A. I'm not saying he got it wrong, I'm just saying I wouldn't
6 have expressed it so strongly.

7 Q. You'd have added the sentence down a little bit?

8 A. I would have added --

9 Q. Going back up to page 2 of 18 and I want to draw your
10 attention to the paragraph that my friend asked you about, the
11 third paragraph on page 2. The acquisition of the core of
12 hold, that's the paragraph. Do you have it?

13 A. Yes, I do.

14 Q. Okay. And there, the second sentence I believe, the third
15 sentence reads, "We are acquiring trading assets with a current
16 estimated value of seventy-two billion dollars and trading
17 liabilities with a current estimated value of sixty-eight
18 billion dollars for a cash consideration of 250 million
19 dollars." Do you see that?

20 A. Yes, I can see that.

21 Q. All right. And then you provided those numerical details
22 to Mr. Varley?

23 A. Yes, that's correct.

24 Q. And you would agree with me, would you not, sir, that that
25 description of the deal does not include any number for assumed

1 liabilities, correct?

2 A. It's specific that it talks about trading liabilities, so
3 it doesn't talk about any nontrading liabilities, which would
4 be the personnel, the comp liabilities and cure liabilities,
5 which we discussed earlier.

6 Q. In fact, I mean -- correct me if I'm wrong. I don't see
7 either there or in the next paragraph that your attention was
8 directed to, the -- two paragraphs down which talks about the
9 two billion dollars post-tax, negative good will. A specific
10 description off the assumed liabilities for comp and cure.

11 A. You're right. They don't appear in this document.

12 Q. Not there?

13 A. You're right.

14 Q. And the number that Mr. Varley lays out there for the
15 investors in that next paragraph down which begins "We also
16 mentioned," that last sentence there, "and the source of that
17 accretion is the negative good will from the transaction, which
18 amounts to about two billion US dollars, post-tax." Do you see
19 that?

20 A. Yes, I can see that.

21 Q. And that's the post-tax number that derives from the
22 formula that you discussed before, 2.25 plus 2, minus 1.35,
23 right?

24 A. Yes. So that's the accounting -- it's post-tax equivalent
25 of that accounting gain because -- yeah.

1 Q. So that number, that formula's been discussed a number of
2 times here. That feeds up into a statement made by Mr. Varley
3 to the public?

4 A. Yes, that's correct.

5 Q. And what you're comparing there really is the 2.25 and the
6 2 that was set forth in Movants' Exhibit 2 versus how you were
7 going to account for that liability, correct?

8 A. That's correct, yes.

9 MR. TAMBE: If I may approach, Your Honor?

10 THE COURT: Are we starting all over?

11 MR. TAMBE: We -- just one document and one suit of
12 questions, Your Honor.

13 THE COURT: I hope it relates to the cross, because if
14 it's --

15 MR. TAMBE: It does, Your Honor.

16 THE COURT: Okay.

17 Q. When we were discussing here Mr. Varley's statements
18 and --

19 MR. SCHILLER: Your Honor, may I interpose an
20 objection to this. I apologize for interrupting you -- to --
21 this witness is not copied on this. He didn't prepare this.
22 So we object to it, to this part of the document on hearsay
23 grounds and also the lack of foundation.

24 THE COURT: Well, I don't know yet how it's going to
25 be used. So I'll reserve judgment on the objection. Is this a

1 document which is not in evidence?

2 MR. TAMBE: It's submitted, Your Honor. There was no
3 objection lodged with respect to it.

4 THE COURT: Well, if it's a document that's in
5 evidence, I suppose it can be used with any witness as long as
6 it's relevant to the questioning of the witness, so let's
7 proceed. But let's also recognize that this witness has been
8 on the stand all morning and into an extended session last
9 evening. So let's move it along if we can.

10 MR. TAMBE: And I will, Your Honor.

11 Q. If you could take a look at this document, Exhibit 140,
12 and please tell us whether you played any role in the
13 preparation of the analysis that is attached to this e-mail
14 chain?

15 A. I -- it says -- at the top it relates to a red briefing,
16 which the initials of Robert E. Diamond -- and I would have
17 been involved in a briefing for Robert Diamond with investors,
18 so I'm sure I would have been involved. In terms of the
19 specific details of this, I've got no recollection of seeing
20 this. I don't know if I ever did.

21 Q. Thank you. Thank you, Mr. Clackson.

22 MR. TAMBE: No further questions, Your Honor.

23 THE COURT: All right. Nothing more? Mr. Clackson,
24 you've had a longer visit to this court than you probably had
25 anticipated. Thank you for your time. Have a good trip home

1 and we'll take a lunch break until 2:00. But before we all get
2 up and leave, I want to know who the witness will be at 2
3 because there are two possibilities, it seems to me. One is
4 Mr. Hughes and one is Mr. Despins.

5 MR. GAFFEY: Mr. Hughes is the next witness, Your
6 Honor.

7 THE COURT: All right. Does that mean that Mr.
8 Despins will not be taken today?

9 MR. GAFFEY: I think that's probable, I mean, given
10 that the amount of time I plan to spend with Mr. Hughes and
11 what I expect will be cross, I think it's unlikely we're going
12 to have Mr. Despins today.

13 THE COURT: All right.

14 MR. GAFFEY: If we did, we wouldn't finish him, so it
15 probably makes sense to --

16 THE COURT: Okay. At the end of the afternoon
17 session, I'd simply like to reserve some time for an off the
18 record conversation about scheduling. That includes how to
19 deal with the need to fit some of this week's witnesses into
20 next week and also how to deal with the Monday schedule which,
21 I had mentioned in a chambers conference, might involve some
22 strange start and stop times.

23 I'm prepared to simply dispense with my midday
24 obligation and allow us to have a full trial day, but I also
25 recognize that there are any number of people who might be

1 involved in the case who would similarly be involved in that
2 activity at midday. So I want to talk about that off the
3 record so that we can develop an appropriate schedule for
4 Monday.

5 MR. SCHILLER: For Your Honor's information, we were
6 advised last night that they had dropped five live witnesses,
7 so there's not pressure at this point as far as we know as them
8 completing their live witnesses next week, with the exception
9 of Mr. Varley, of course, who we reached agreement on.

10 MR. GAFFEY: Not quite the issue, Your Honor, and I'm
11 happy to take that up in the chambers conference. I wanted to
12 say only that we have dropped a few of our in-person witnesses
13 scheduled for this coming week as opposed to coming phase, I
14 think Judge, we can talk about later. But if Your Honor needed
15 to address your schedule for Monday over the lunch hour, I can
16 say that there is some room on Tuesday and Wednesday to move
17 witnesses and it won't impinge any plans of any party, I think.
18 Am I getting nods? Yes. I mean, the point, Your Honor, is the
19 schedule is now built for overflow. If a witness goes long,
20 we're still going to finish on the current list by the end of
21 the week --

22 THE COURT: Okay.

23 MR. GAFFEY: -- and we will have some time next week
24 to read some deposition transcripts and get that process
25 moving, too, so we can move the record along and excite Your

1 Honor with deposition transcripts.

2 THE COURT: That's really something for me to look
3 forward to. Okay, terrific. We'll take a lunch break, resume
4 at 2:00 and hopefully have some time at the end of the day to
5 talk off the record. And an off the record conversation that
6 would probably be the easiest would be to simply have people
7 who are not party to the conversation leave the courtroom. We
8 can all stay here, close the record and then have a -- what
9 amounts to a chambers conference in the courtroom.

10 MR. GAFFEY: All right.

11 THE COURT: Okay.

12 MR. TECCE: Your Honor, if I may. I'm sorry. I just
13 didn't know we resolved the point about Mr. Despins, if -- he's
14 prepared to come today, I just don't know if the expectation is
15 that he should or not. If he's not, I would like to be able to
16 tell him.

17 THE COURT: Let's release him.

18 MR. GAFFEY: We hadn't talked about it and yes, we
19 should release him.

20 MR. TECCE: Okay.

21 MR. GAFFEY: I know how long I'm going to takes with
22 Mr. Hughes, around.

23 THE COURT: Let's release him and he, I suppose,
24 becomes either the first or second witness on Monday.

25 MR. GAFFEY: Or we can figure out a place for him.

1 THE COURT: Or some other place that's convenient for
2 the parties. Fine.

3 MR. GAFFEY: Thank you, Your Honor.

4 THE COURT: We'll break for lunch until 2.

5 (Recess from 12:31 p.m. until 2:10 p.m.)

6 THE COURT: Be seated, please. Good afternoon. Is
7 Mr. Hughes the next witness?

8 MR. GAFFEY: Beg your pardon, Your Honor?

9 THE COURT: Is Mr. Hughes the next witness?

10 MR. GAFFEY: Mr. Hughes is the next witness, yes.
11 Movants call Jonathan Hughes.

12 THE COURT: Fine. Good afternoon, Mr. Hughes. Please
13 raise your right hand.

14 (Witness duly sworn)

15 THE COURT: Be seated, please.

16 DIRECT EXAMINATION

17 BY MR. GAFFEY:

18 Q. Good afternoon, Mr. Hughes.

19 A. Good afternoon.

20 Q. Mr. Hughes, I remember from our deposition you have a soft
21 voice. So I'm going to ask you, please, to pull the microphone
22 and sit close to it as best you can remember to do that,
23 please.

24 A. I'll do my best.

25 Q. Thank you. Other than your deposition, sir, we have not

1 met, is that correct?

2 A. Other than Starbucks for Monday morning, I think --

3 Q. That's true. That's true.

4 A. -- that's --

5 Q. You didn't buy me coffee and I didn't buy you coffee. Mr.
6 Hughes, how are you employed, sir?

7 A. I am employed by Barclays Capital. Up until a few weeks
8 ago, I was the global general counsel for Barclays Capital. In
9 the last few weeks, I've taken on another role which will be to
10 investigate a seed of a new business and have relinquished my
11 general counsel responsibilities with the exception of looking
12 after this good piece of litigation.

13 Q. Okay. And did you hold those general counsel
14 responsibilities in September of 2008 when the sale transaction
15 took place?

16 A. I did.

17 Q. And I take it you were intimately involved with the
18 Barclays activities in connection with the sale transaction, is
19 that right?

20 A. As intimately as I could be, yes.

21 Q. Okay. And just by way of background, sir, could you give
22 the Court a brief description of your education and any
23 professional licenses or qualifications?

24 A. Sure. I qualified as a lawyer originally in England in
25 1983 when I was accord to the bar. I practiced as a barrister

1 for about four years in England. When I joined -- moved from
2 the bar to join what was then the predecessor of the UBS group,
3 I worked for UBS in London and New York as a lawyer, originally
4 setting up their legal and compliance function in London from
5 '87 through to about 1996. I was a partner in two different
6 law firms, lastly Katten Muchin. And I joined Barclays Capital
7 in 2003. Along the way, I went through the pain of the New
8 York bar and qualified around '96, I think.

9 Q. Okay. And with regard to the sale transaction, Mr.
10 Hughes, would you give the Court a brief description of the
11 nature of your activities with regard to the sale transaction
12 during the week -- well, in the period beginning, say,
13 September 11th and 12th through the closing of the sale
14 transaction on the 22nd?

15 A. The first time that I was aware that there was a
16 transaction of any meaning possible was on the evening of the
17 Thursday -- I would guess it would be the 11th of September
18 when I was in Frankfurt and I received a call from Gerard
19 LaRocca who is the chief administrative officer of Barclays
20 Capital Inc. mentioning that there might be a transaction that
21 we needed to work on. I was due to come back to New York from
22 German on the following day in any event. I spent a bit of
23 time in between finding counsel who might be able to act on the
24 transaction. And I arrived back in New York around about 7:30
25 on the Friday evening which was then the 12th, I guess. I went

1 immediately to the offices of Simpson Thacher where some of the
2 early due diligence had commenced with respect to what was the
3 initial planned -- transaction. And from then on, I was
4 directly responsible for marshaling the legal resources
5 necessary to pursue a transaction with Lehman Brothers which
6 meant marshaling both the internal and the external resource
7 from a legal perspective that was necessary to pursue the
8 transaction.

9 I stayed intimately involved from that point in time right
10 through -- up to and including the closing and, indeed, beyond.
11 I can certainly take you through the detail of what happened
12 between the 12th and the 22nd but I suspect --

13 Q. We'll spend a bit of time on that.

14 A. -- that's where we're going to go to.

15 Q. Now, one of the things you mentioned is that you were
16 marshaling the various legal resources. Do I understand that
17 correctly to mean that from the client perspective you were the
18 one responsible for instructing outside counsel?

19 A. Ultimately, yes. As the person -- the seniormost lawyer
20 within Barclays Capital, I was responsible for the legal
21 aspects of the deal. And that included, at least to some
22 degree, both personally but through people who worked with me
23 directing the resource as best we could.

24 Q. And one of the things you may recall, sir, that has
25 occurred during the course of this litigation is you have been

1 designated by Barclays as its witness under Rule 30(b)(6) with
2 regard to a variety of topics, correct?

3 A. I was so designated prior to my deposition. I confess I'm
4 not entirely certain whether I still am a 30(b)(6) but I'm
5 expecting that you're going to tell me that I am.

6 Q. Well, as part of your duties as a 30(b)(6) witness, with
7 respect to those topics, you went off and you conducted an
8 investigation to learn the state of Barclays' knowledge about
9 those matters, is that right?

10 A. I did do as much of that as I could.

11 Q. Or designated by Barclays to speak on its behalf with
12 regard to those topics, do you recall that?

13 A. I do.

14 Q. And those topics included the sale hearing? Do you recall
15 that?

16 A. Certainly aspects of the sale hearing.

17 Q. And representations made to the Court -- whether
18 representations to the Court were fairly and accurately
19 disclosed regarding the sale transaction? Do you recall that
20 being a topic?

21 A. I do.

22 Q. And the topic of Barclays' gain, if any, on the
23 acquisition. Do you recall that being a topic about which you
24 were a 30(b)(6) witness?

25 A. It was a topic. I didn't think I was the only person who

1 was capable of giving testimony or being deposed about those
2 issues. But certainly, they were part of the subject matter
3 that I covered, yes.

4 Q. Okay. And there were other subjects and we may come to
5 those later today. But those three were within the ambit of
6 your designation as a 30(b)(6) witness and your investigation
7 of those topics to be a 30(b)(6) witness, correct?

8 A. I believe that's correct, yes.

9 Q. Okay. Now, in your capacity as the chief legal officer
10 around the transaction, was it also one of your
11 responsibilities to monitor the proceedings in this Court
12 concerning approval of the transaction?

13 A. No. I don't think I had a responsibility to monitor the
14 proceedings. And I didn't -- nor was I actually present during
15 the proceedings either on the Friday, the 19th, or on the 17th.
16 So I wouldn't say it was a responsibility to monitor them, no.

17 Q. I don't mean monitor in the sense of physically attending
18 the hearing, sir. I mean, more along the lines of keeping
19 yourself aware of the progress of the proceedings and the
20 events that occurred in the proceedings before this Court. You
21 did that during the week of the 15th of September through the
22 closing on the 22nd, is that right?

23 A. I think at a high level, I did my best to keep aware of
24 what had actually transpired. But there were an enormous
25 number of things going on at that point in time. If I wasn't

1 personally able to be specifically knowledgeable about it then
2 there were either members of my department attending to those
3 events or, alternatively, or perhaps in addition, members of
4 the law firm of Cleary Gottlieb and/or Sullivan & Cromwell also
5 attending to those matters. And clearly, part of their role
6 was to let me know if there was something of meaning or
7 significance that they felt that I should be aware of.

8 Q. So, generally, during that week, sir, things of meaning
9 and significance would have included the hearing before this
10 Court on the 17th of September, 2008, the initial sale
11 procedures hearing?

12 A. Yes. I was certainly aware that they were happening. And
13 there were some reports, I'm sure, of the proceedings.

14 Q. And motions that were filed with the Court in connection
15 with seeking the Court's approval of the sale transaction?

16 A. Again -- again, certainly, at that high level I was aware
17 of them. Certainly.

18 Q. Okay. And certainly the sale hearing that took place on
19 Friday the 19th of September, yes?

20 A. Absolutely. I was aware of it, yes.

21 Q. All right. And events in the weekend following the sale
22 hearing with regard to, among other things, the finalizing of a
23 certain clarification letter. Is that included in things you
24 kept apprised of?

25 A. As best I could, yes.

1 Q. Now, you have said in the past, Mr. Hughes, that Barclays
2 only intended to do the deal, do the sale transaction if it
3 yielded a gain to Barclays, is that right?

4 A. I believe I answered that. And that was my understanding
5 at the time.

6 Q. And the concept of Barclays deriving a gain on the
7 transaction never changed in yours or Barclays' view from the
8 15th of September through the closing of the transaction,
9 correct?

10 A. I think that's correct. And I think it was so for a
11 couple of reasons. The -- there were important drivers at that
12 point in time. The first, I think, was -- and if you'll
13 forgive me, I think it's worthwhile stepping back a second
14 here. The strategic goal for Barclays in this transaction was
15 it -- was the paramount reason for doing the transaction. By
16 "strategic goal", I mean, at that point in time, while Barclays
17 Capital had grown appreciably in the United States in prior
18 years, we were, relative to some of our other competitors in
19 the marketplace, somewhat smaller. The Lehman transaction
20 presented a strategic opportunity for growth which, I think,
21 the bank felt at the time was unlikely to come along again any
22 time soon. And if it were -- if it proved to be on other tests
23 an appropriate transaction, it was one way in which to achieve
24 that strategic goal of growth in the United States.

25 One of those additional tests was always likely to be what

1 the impact of the transaction will be for the capital of the
2 bank. That particular issue was profoundly more important in
3 September 2008 than it would have been, I think, in any other
4 time either before or since. As I'm sure you'll recall, there
5 was a substantial amount of concern with respect to the capital
6 of all financial institutions. We were not immune from that
7 concern particularly from our shareholders and particularly
8 also from our regulators.

9 So I think it was particularly important for the bank
10 to -- if it were to pursue a transaction to ensure that it was
11 positive from a capital standpoint both for shareholders and,
12 indeed, just as importantly for regulators who I think at the
13 time would have been extremely concerned had we not -- had we
14 proposed a transaction that might have some negative impact
15 upon capital.

16 Q. And it was sufficiently -- profoundly so important that it
17 was, in Barclays' view, a precondition of the sale transaction
18 that's brought us here, that it yielded a first day gain for
19 Barclays, is that right?

20 A. I think it was a -- my understanding at the time was that
21 it was a -- for Barclays it was, essentially, a precondition.
22 I don't know that there was ever a portion of the day-to-day
23 discussion or that people used that particular word to describe
24 it. But it was so important to Barclays. And my impression
25 was that people on the Barclays team understood it to be so

1 important that this was a positive thing to do from a capital
2 standpoint that I felt it to be for our purposes a
3 precondition.

4 Q. So you're couching your answer in terms of, for Barclays'
5 purposes, for our purposes, the people on the Barclays team.
6 Was it made known to anyone outside of Barclays, sir, that it
7 was a precondition to the transaction that Barclays have a day
8 one gain?

9 A. I didn't think it was specifically mentioned, for example,
10 to people at Lehman Brother that it was a precondition as such.
11 But I do think it was plain during the course of the
12 negotiations that for Barclays to receive assets as compared to
13 liabilities they were greater than those liabilities, that that
14 was an important feature of our ability to do a transaction
15 because without some greater amount of assets as compared to
16 liabilities and greater value coming to Barclays than the
17 liabilities that Barclays was going to take on in the
18 transaction, I think that it was very likely, from our
19 perspective, that we would, at a minimum, risk there being a
20 negative impact on capital. And it was, in my view at the time
21 and at my understanding at the time, that Barclays simply did
22 not want as best it could to take a risk of a negative capital
23 impact.

24 So it's a rather longwinded answer and I apologize. I
25 wouldn't say we haven't told anybody it was an actual

1 precondition but that's how we went about the job, so to speak.

2 Q. Well, you said, sir, it was plain, it was plain in the
3 negotiations. Let's explore that a little bit. Nobody at
4 Barclays ever told anyone at Lehman it was a precondition to
5 Barclays that Barclays have a first day gain on the sale
6 transaction. Is that correct?

7 A. I don't recall anybody using that phraseology.

8 Q. Well, let's not stumble over the particular noun, sir.
9 Did anyone from Barclays say to anyone at Lehman, in sum or
10 essence, that it was a precondition of Barclays doing the
11 transaction that it make a first day gain?

12 A. I don't think anybody at Barclays said the words the words
13 that you just said, no.

14 Q. Okay. Did anyone ever say to anyone -- did anyone from
15 Barclays ever say to anyone at Lehman it was imperative to
16 Barclays that there be a first day gain on the acquisition?

17 A. I'm not aware of anybody, again, using that phraseology.

18 Q. So, from your point of view, sir, the answer to that
19 question is no?

20 A. Well, your question, I think, was in sum or essence.
21 Nobody used those phrases. But --

22 Q. Well, that's what -- forgive me for interrupting. But
23 let's use that particular word. Let's use that particular
24 word. To your knowledge, did you or anyone else from Barclays
25 say to anyone from Lehman in the negotiations it's imperative

1 that Barclays have a first day gain in this transaction.

2 A. No, not that I know.

3 Q. Okay. And to your knowledge, sir, did anyone inform this
4 Court that it was a precondition to the transaction that
5 Barclays have a first day gain?

6 A. I'm not aware that anybody used that phrase, again, no.

7 Q. Let's try in sum or essence again then. Do you know if
8 anyone informed this Court, in sum or essence, that it was a
9 precondition that Barclays have a first day gain?

10 A. I don't think the -- I think the short answer is no. No.
11 I don't think anybody did use that phraseology. I don't think
12 anybody said that there needed to be -- that it was a
13 precondition that there be a gain. In one of my earlier
14 answers, I said that there were other issues that were known.
15 But I don't think anybody said it was a precondition.

16 Q. And no one from either Lehman or Barclays informed the
17 Court in any way, shape or form, sir, that it was a
18 precondition to the transaction that Barclays have a first day
19 gain, isn't that correct?

20 A. Sorry. Could you repeat it? Did you ask me whether --

21 Q. As far as you know --

22 A. -- Barclays said that?

23 Q. Let's start with Barclays. As far as you know, sir,
24 nobody from Barclays said to this Court in any way, shape or
25 form that it was a precondition or imperative to Barclays that

1 there be a first day gain for Barclays in the sale transaction?

2 A. I'm not aware of anybody in Barclays saying that, no.

3 Q. And you're not aware, sir, of anybody from Lehman

4 informing the Court in any way, shape or form that it was

5 imperative for Barclays to complete the transaction to have a

6 first day gain, are you?

7 A. I don't think that was said.

8 Q. And in all of your work keeping apprised of the events

9 before this Court concerning the sale transaction, you didn't

10 learn that anyone informed the Court in any way shape or form

11 that the sales transaction required a first day gain for

12 Barclays?

13 A. With the exception that there were other pieces of

14 information from which one might have been able to deduce that,

15 I agree with your -- I agree with you.

16 Q. Okay. So apart from pieces from information from which

17 one might have been able to deduce that it was a precondition

18 to Barclays that there be a first day gain, you're aware of no

19 other way for the Court to know that it was a precondition to

20 Barclays that there be a first day gain. Is that correct?

21 A. That's correct.

22 Q. And I take it that as part of your duties in connection

23 with the sale transaction, you would have reviewed the motions

24 that were filed before the Court seeking the Court's approval

25 of this acquisition?

1 A. I can't tell you now that I did do that. I don't recall
2 whether or not I did.

3 Q. Okay. Well --

4 A. Somebody in my department would certainly do it. And
5 certainly, lawyers acting for Barclays Capital did.

6 Q. Okay. I take it from your prior answers that nothing ever
7 came to your attention in the various papers that were filed
8 with the Court concerning a first day gain for Barclays or
9 precondition of a first day gain for Barclays.

10 A. I'm not aware of anything in the papers that, again,
11 highlighted a precondition for Barclays, no.

12 Q. And I take it then, sir, that nothing that --

13 MR. GAFFEY: Withdrawn.

14 Q. I believe you said, sir, that Barclays' representation --
15 its outside representation in connection with the sale
16 transaction included the lawyers at Cleary Gottlieb, is that
17 right?

18 A. Correct.

19 Q. And lawyers at Sullivan & Cromwell, is that correct?

20 A. Yes.

21 Q. And actually, later in the sequence, come December of
22 2008, some lawyers from Boies Schiller as well, is that
23 correct?

24 A. Yes. At that point in time, Boies Schiller was
25 representing us with respect to a particular set of issues

1 which came -- which arose during the transaction. But Boies
2 Schiller was not at that point advising us with respect to the
3 Lehman transaction.

4 Q. I didn't mean to suggest they were, sir. So the record is
5 clear, the Boies Schiller involvement -- and we'll get to the
6 topic a little later -- is, roughly, the end of the year. It's
7 November/December, is that right?

8 A. Correct.

9 Q. It's not in connection with the sale transaction itself in
10 real time when it's being brought to the Court for approval.

11 A. Correct.

12 Q. Okay. Now, I take it in your position as chief legal
13 officer and your work in connection with the sale transaction,
14 it would have been within the ambit of your responsibilities to
15 give instructions to your outside counsel to make the necessary
16 disclosures to the Court so it had fair and accurate disclosure
17 of the terms of the transaction. Is that right?

18 A. Yes. Any obligation that we owed at that point in time to
19 the Court I would certainly expect that, together with our
20 external advisors, we'd ensure -- we'd do everything we could
21 to meet those obligations. Absolutely.

22 Q. And you refer to any obligation that we had at any point
23 at that time. By "that time", do you mean the period from the
24 15th through the 22nd, that is, the days leading up to the sale
25 hearing and through the closing?

1 A. Well, I think any obligation in connection with the
2 proceedings before the Court, yeah.

3 Q. And in Barclays' view, did it have an obligation to make
4 disclosures to the Court in connection with the sale
5 transaction?

6 A. I think that the way that the transaction was framed and
7 the arrangements framed, there was an agreement that the
8 lawyers acting for Lehman Brothers would be responsible for
9 making the necessary disclosures to the Court, making the
10 necessary arrangements so that the relevant Court relief could
11 be sought and hopefully achieved. And I think that the
12 parties, although I don't recall a specific discussion about
13 this, I think the parties presumably felt that it was the right
14 thing to do to have one presentation of the facts that were
15 relevant. And I believe, in that context, there was an
16 agreement that we would seek consent before we did anything.
17 So there was a limitation to that extent. But certainly, if
18 there was anything that arose that was of meaning or of
19 relevance or felt to require intervention by Barclays, I
20 certainly would have expected our external lawyers to tell us
21 that and, if necessary, to do something about it.

22 Q. This agreement you referred to, sir, concerning the extent
23 to which Barclays could make disclosures to the Court, was that
24 part of the asset purchase agreement?

25 A. I think it was, yes.

1 Q. You have before you, sir, a binder, I hope.

2 A. I do.

3 MR. GAFFEY: And, Your Honor, you appear to be the
4 only one without your book. Can I approach?

5 THE COURT: Yes.

6 Q. And you'll find behind tab 1 of your binder, Mr. Hughes,
7 Section 7.2.

8 A. That's M-1, yeah?

9 Q. I beg your pardon. M-1.

10 A. Yes, I see it.

11 Q. And is Section 7.2 the asset purch -- take a moment, sir,
12 to familiarize yourself with the section. And then tell us
13 whether Section 7.2 of the asset purchase agreement is the
14 agreement you referred to a moment ago concerning whether or
15 when Barclays could address the Court with regard to the sale
16 transaction.

17 A. Yes. That looks like it's the relevant section.

18 Q. And that section reads, I think in pertinent part,
19 beginning the last two words on page 22: "Purchaser shall not
20 without the prior written consent of seller file, join in or
21 otherwise support in any manner whatsoever any motion or other
22 pleading relating to the sale of the purchased assets
23 hereunder." Do you see that?

24 A. I do.

25 Q. Is that the provision which you are reading which, in your

1 view, restricted Barclays from making disclosures to the Court
2 in connection with the sale transaction?

3 A. I think -- that's the provision I'm referring to. I think
4 it said there was a limitation. I don't -- and -- but that's
5 the provision that I had in mind, yeah.

6 Q. I'm sorry, sir. Did you say you don't think of it as a
7 limitation?

8 A. No. I think I said I used the word "limitation", not the
9 word "restriction".

10 Q. Okay.

11 A. But that's what I had in mind, yes.

12 Q. All right. And when you had that in mind, did you notice
13 the provision about how ever it was it limited Barclays or, to
14 use my word, restricted Barclays, it was an easy limitation to
15 lift simply by asking the permission of the seller?

16 A. Yes. It didn't actually arise as far as I recall. But
17 yes. It would have been a fairly easy thing to seek that
18 consent, absolutely.

19 Q. Well, did Barclays have lawyers in attendance at the sale
20 procedures hearing on the 17th of September and at the sale
21 hearing on the 19th?

22 A. Yes.

23 Q. And to your knowledge, did lawyers for Barclays address
24 the Court in connection with the sale procedures hearing and
25 the sale hearing?

1 A. I don't immediately recall exactly what the addresses
2 referred to. But I think there were moments during each of the
3 proceedings when representatives of Barclays' law firms did
4 speak, yes. Absolutely.

5 Q. Well, for example, sir, there were, to use your word,
6 moments when Lindsay Granfield stood up and addressed the Court
7 about aspect of the sale transaction, correct?

8 A. Correct.

9 Q. For example, do you recall a time when Ms. Granfield,
10 toward the end of the sale hearing, talked about whether or not
11 certain safe harbor provisions applied?

12 A. I don't know -- recall that specific piece. But
13 certainly, there were several occasions when people when Cleary
14 Gottlieb spoke.

15 Q. And I don't mean to single out Ms. Granfield. I mean, as
16 a general matter, sir, there were lawyers from Cleary Gottlieb
17 in the courtroom for both hearings and they spoke to the Court,
18 correct?

19 A. I believe that's correct, yes.

20 Q. And in fact, sir, do you recall or have you learned that
21 at the beginning of the sale hearing before -- well, the Court
22 convened briefly and then granted a recess so that lawyers and
23 others could talk to those assembled about changes that had
24 occurred in the deal during the week.

25 A. I did become aware of that, yeah.

1 Q. Okay. And you are aware, are you not, that a man named
2 Michael Klein spoke during that recess provision -- that
3 recess?

4 A. I wouldn't say that I'm aware that Michael Klein spoke.
5 As you pointed out, one of the things that I tried to do as a
6 30(b)(6) witness was to try to establish what, in fact, had
7 happened at that hearing. It was own dim and shaky
8 recollection that perhaps Michael Klein had spoken or because,
9 as I say, I wasn't present. But my own recollection was that I
10 did speak to Michael Klein to try to establish whether in fact
11 such a discussion took place or -- and if so, what was said.
12 My recollection of that discussion with Michael Klein was that
13 he could not remember particularly well and so I didn't feel
14 that, in light of my own shaky recollection I could say one way
15 or another. I thought he had. He wasn't sure. I didn't --
16 I'm still not sure.

17 Q. Okay. Quite apart from the content of what he said, sir,
18 the fact is you vaguely know and you learned as part of your
19 30(b)(6) related investigation that Michael Klein stood in this
20 courtroom as a representative of Barclays talking to attendees
21 at the sale hearing, yes?

22 A. No. I think I may not have -- my last answer may not have
23 been clear. What I intend to say is I'm not sure about that.
24 I had thought at one point in time that that had happened but
25 I'm not sure that it did. I think, in any event, it did take

1 place, if at all, at a time when the Court was not sitting as I
2 understand it.

3 Q. Would that be the distinction in your mind, sir? You make
4 that point, that the Court was not sitting. Is there some
5 distinction between the court being in session with Judge Peck
6 on the bench and a recess at a hearing before the Court in
7 terms of this limitation that you think 7.2 put on Barclays?

8 A. Well, I hadn't thought about it in that context, to be
9 honest. The distinction is does it help me remember better
10 when the thing may have happened. My recollection had been,
11 shaky otherwise, that if Michael Klein had made some kind of
12 presentation, I had thought that it was at a time when the
13 Court wasn't sitting. So that's the reason why I focused on
14 that.

15 The specific language of this clause allow for Michael
16 Klein to do something on a more informal basis. I think if I
17 read it now I could probably justify that approach. But that's
18 now I had thought about whether or not the event had taken
19 place.

20 Q. Quite apart from Section 7.2 of the asset purchase
21 agreement, sir, the fact is that lawyers and other
22 representatives -- well, lawyers representing Barclays
23 addressed the Court during proceedings relating to the sale
24 transaction, right?

25 A. Correct.

1 Q. We agree on that?

2 A. Correct.

3 Q. And they made representations or arguments or statements
4 to the Court in connection with the motion seeking approval of
5 the sale transaction, correct?

6 A. Again, I can't recall the specifics. But yes, they
7 addressed the Court and presumably said things of substance.

8 Q. And you agree with me -- and as a 30(b)(6) witness, sir,
9 Barclays agrees, does it not, that if its lawyers do stand up
10 and speak to the Court, they have -- Barclays has a full and
11 complete duty of truth and accurate disclosure about the
12 transaction at issue, correct?

13 A. Of course. Absolutely.

14 Q. Of course they do. And if they know that there is
15 material or pertinent information that is not being told to the
16 Court, Barclays has an obligation to bring that information to
17 the Court's attention, correct?

18 A. Certainly, if it's material. We could possibly debate
19 what pertinent means but certainly, if it's material. Of
20 course.

21 Q. And they either should address the Court directly or
22 inform those who are about a mistake or incorrect information
23 or incomplete information that's given to the Court. Barclays
24 understood it had that obligation, correct?

25 A. Absolutely.

1 Q. Now, you described the -- you agree that the -- that
2 Barclays' view was that it was imperative that it make a first
3 day gain on the acquisition. Do you know, sir, if the lawyers
4 for Barclays were aware that it was an imperative that Barclays
5 make a first day gain on the acquisition?

6 A. Again, I don't recall whether or not there was any
7 discussion in those terms. I do think that the lawyers acting
8 for Barclays understood that it was crucial to Barclays that
9 there be positive outcome on that transaction. And by
10 positive, I mean one which yielded -- which I could use the
11 term -- the phraseology now, which yielded a gain for Barclays.
12 In other words, it was positive from a capital standpoint and
13 that we made money on it and we didn't lose money.

14 Q. You used the term before that you believed, although
15 Barclays had not said that it was an imperative there be a
16 first day gain, that people might have been able to deduce that
17 that was a precondition for Barclays. You recall that?

18 A. Yes.

19 Q. Was it Barclays' view that the Court might have been able
20 to deduce that it was imperative there be a first day gain for
21 Barclays on the acquisition?

22 A. I certainly wouldn't want to speak for what the Court
23 would or would not be able to --

24 Q. I'm asking about Barclays' view, sir, not the Court's
25 view. I'm asking if it was Barclays' view that the Court might

1 have been able to deduce that it was imperative there be a
2 first day gain for Barclays on the acquisition.

3 A. As I was conducting the review that we've touched on once
4 or twice to prepare to be a 30(b)(6) witness, it appeared to me
5 from what I read and from what -- and from the people I spoke
6 to that that was possible, yes.

7 Q. And was it Barclays' view at the time of the sale
8 transaction proceedings that it was sufficient, as a matter of
9 disclosure, that the Court might have been able to deduce that
10 it was an imperative Barclays have a first day gain on the
11 acquisition?

12 A. Could you repeat the question?

13 Q. Well, sir, did Barclays think that was enough in terms of
14 disclosure that the Court might have been able to figure it
15 out?

16 A. I think at the time those present for Barclays would not
17 have been -- even if they were knowledgeable about the detail,
18 they wouldn't necessarily have been certain about it. I don't
19 think that at that particular point in time those present for
20 Barclays felt that it was a necessity to make the disclosure in
21 those terms. I think the people who were present in the room
22 for Barclays felt that what was disclosed to the Court at the
23 time was full and fair and accurate, was sufficient, certainly,
24 to fulfill what we felt were our disclosure requirements at the
25 time. Naturally, we were relying, to some degree, on others to

1 make the presentation and to make the relevant disclosures.

2 And there was a certain amount of faith, absolutely, placed in
3 the Weil Gotshal firm to get that right. But certainly, we
4 didn't -- I believe, through the people I've spoken to or from
5 what I've read, feel that there was a lack of disclosure in any
6 way.

7 Q. Well, sir, you said a few moments ago that Barclays had
8 not actually told anybody outside of Barclays that it was
9 imperative that there be a first day gain for Barclays. Do you
10 recall that?

11 A. I recall -- that's absolutely what I said, yeah.

12 Q. Okay. And I take it then that nobody from Barclays ever
13 told anybody from Weil Gotshal it was imperative there be a
14 first day gain for Barclays, is that correct?

15 A. I don't know that anybody did.

16 Q. Okay. So to the extent that Barclays was relying on Weil
17 Gotshal to make disclosures, you would agree with me, sir, that
18 Weil Gotshal wasn't in a position to make a disclosure that it
19 was imperative for Barclays there be a first day gain on the
20 acquisition, correct?

21 A. It would have been hard for them to do so.

22 Q. Well, it would be impossible, wouldn't it, sir? If they
23 don't know, they can't tell the Court. Unless they had been
24 able to deduce that it was imperative there be a first day gain
25 for Barclays.

1 A. I agree with you.

2 Q. Okay. So had Weil Gotshal been able to deduce that it was
3 imperative, Weil Gotshal might have been in a position to make
4 a disclosure to the Court about this precondition of the sale
5 transaction. Is that right?

6 A. I don't think, as I said, that it was a precondition to
7 the sale transaction in a formal sense. I've -- we've

8 Q. It was --

9 A. -- used that term to identify the significance to Barclays
10 of the need for a gain.

11 Q. Well, sir, was it a condition of the agreement -- was it a
12 condition of the agreement that Barclays make a first day gain?

13 A. No. Which is possibly part of the reason why nobody felt
14 that it needed to be disclosed, I don't know.

15 Q. So it was an informal precondition? Does that make it a
16 preference? Does that make it its desire or does that make it
17 a precondition to the deal? Which is it, sir?

18 A. I think it's an indication of what is of real significance
19 to Barclays without making a comment in using that phrase about
20 what was imperative to Lehman Brothers or whether or not that
21 particular imperative of Barclays needed to be disclosed itself
22 to the Court.

23 Q. Okay.

24 A. At the time, nobody at Barclays felt that that imperative,
25 as I've subsequently described it, needed to be disclosed.

1 Q. I want to ask you this question very precisely, sir. Was
2 it a condition of the agreement that Barclays make a first day
3 gain?

4 A. No.

5 Q. Would you turn to page 350 of your deposition transcript
6 which is in the binder before you?

7 A. Can you tell me whereabouts it is in the binder?

8 Q. You ought to have a tab that says "Transcript". Find it?

9 A. Yes. I have it.

10 Q. And when you're there, go to page 350. And I'd ask you
11 take a look at the question and answer from line 2 through line
12 4. Let me know when you get to the page. Okay. Do you see
13 this question and this answer, sir?

14 "Q. Was it a condition of the agreement that Barclays make a
15 first day gain?

16 "A. It was a precondition for Barclays."

17 Was that truthful testimony when you gave it, sir?

18 A. Yes.

19 Q. All right. And when I asked you a moment ago those
20 precise words, was it a condition of the agreement that
21 Barclays make a first day gain and you answered "No", are you
22 making some distinction between a condition and a precondition?

23 A. Not just that, but also I did use the phrase "for
24 Barclays".

25 Q. Ahh.

1 A. I wasn't intending to suggest when I gave you that answer
2 nor was I intending to suggest today that it was a condition of
3 the agreement in the sense that I would view a condition of the
4 agreement in a legal sense.

5 Q. Okay, sir.

6 A. It was a precondition for us to close the transaction.
7 For us, we wanted to ensure a gain.

8 Q. So when I asked you at your deposition was it a condition
9 of the agreement that Barclays make a first day gain and you
10 answered "It was a precondition for Barclays", those present
11 were meant to understand your answer to mean no?

12 A. I think the answer was intended to be understood as I've
13 just described. I don't recall at the time being asked either
14 then or subsequently whether it was a condition in a formal
15 legal sense. It's possible that you were asking me that but I
16 didn't interpret it that way at the time.

17 Q. Okay. So let's explore a little bit this concept of an
18 informal precondition. Would Barclays have done the deal if
19 there was no first day gain built in to the deal?

20 A. I wouldn't say, first of all --

21 Q. Was it formal to that extent --

22 A. -- that there was any gain built into the deal, first of
23 all. Secondly, if by your question you mean that Barclays --
24 would Barclays have closed the transaction if it didn't think
25 it was going to make a gain, no I don't think Barclays would

1 have.

2 Q. And in that sense, is that what you meant by it was a
3 precondition for Barclays? It wouldn't close if it didn't have
4 a first day gain?

5 A. It wouldn't do the transaction. If I may take you back to
6 something I said earlier, the -- this transaction was first and
7 foremost about strategic development of the bank. And
8 secondly, assuring that if we were to pursue that sort of
9 strategic transaction that it was positive to capital and
10 beneficial therefore to shareholders and not a negative from a
11 regulatory capital and, therefore, from our regulators'
12 perspectives.

13 Q. Okay.

14 A. So it was, for us, a precondition. Other words that one
15 could use? I didn't necessarily spend a lot of time then
16 thinking about the particular word "precondition". I was more
17 concerned to identify for you in answering the question that
18 this was something that was of huge importance to Barclays. I
19 couldn't tell you whether it was of huge importance to anybody
20 else. But it was not a formal condition in the legal sense in
21 the agreement.

22 Q. Okay. Did you think it might be of some degree of
23 importance to the Court when it was assessing the transaction
24 for the purpose of deciding whether to grant or deny the sale
25 motion that Barclays wouldn't close if there wasn't a first day

1 gain in it?

2 A. No, I didn't think that and nor did the people who were
3 then present for Barclays because I think those people present
4 thought then and Barclays had always thought that the necessary
5 disclosures were made to the Court to enable the Court to make
6 a determination.

7 Q. Would those be disclosures sufficient to enable the Court
8 to maybe be able to deduce that Barclays would take more assets
9 than it would assume liabilities, that it would have a first
10 day gain?

11 A. There is, I'm sure, more that goes into the analysis of
12 what yields a first day gain than just do the assets outweigh
13 the liabilities though I would think that would be likely a
14 pointer. But I think it's important for me to say that at the
15 time, I don't think anybody at Barclays nor any of its
16 advisors, felt that there was an absence of any formal or -- of
17 disclosure or detailed disclosure. And I don't think anybody
18 ever advised Barclays nor did Barclays think at the time that
19 it was a necessary part of the disclosure to identify this
20 point of huge significance to Barclays.

21 Q. Was it -- this point of huge significance to Barclays,
22 have you ever spoken to Bob Diamond, the president of Barclays,
23 about it?

24 A. I couldn't tell you that I specifically have spoken to Bob
25 about it.

1 Q. Have you -- has it come to your attention that Mr. Diamond
2 has said that an asset/liability mismatch in Barclays' favor
3 was a condition to the deal?

4 A. It's possible that Mr. Diamond may have said something to
5 that effect at his deposition.

6 Q. Let me refresh your recollection, sir. You came to Mr.
7 Diamond's deposition, correct?

8 A. I think I just finished off that last sentence by saying
9 it's possible he said something to that effect at his
10 deposition.

11 Q. All right. 'Cause I remember seeing you there. Did you
12 hear him say that an asset/liability mismatch in Barclays'
13 favor was a condition to the deal?

14 A. I don't now recall that phrase but it wouldn't surprise me
15 if he used it.

16 Q. Wouldn't surprise you because you knew it at the time back
17 in September of 2008, correct?

18 A. I think that Barclays was looking to take on a greater
19 value of assets than the liabilities. Absolutely.

20 Q. And in the process, meet its own condition for a first day
21 gain, yes?

22 A. That would be a good part of it. I'm not necessarily
23 saying right now that it's the whole but it's certainly a big
24 part of it, yes.

25 Q. So let me go back to the question I asked you a few

1 moments ago. While Barclays had the view that it was a
2 precondition that it have this asset/liability mismatch, this
3 first day gain, was Barclays of the view that it was not
4 necessary to tell that fact to the Court when approval was
5 sought for the transaction?

6 A. The fact of the precondition for Barclays? Is that your
7 question?

8 Q. Yeah.

9 A. I don't think that that was a necessary disclosure to the
10 Court. And certainly nobody ever advised Barclays that it was,
11 either.

12 Q. Of all those making representations to the Court, sir,
13 concerning the structure and the terms of the transaction,
14 you're not aware of anybody who made any representations to the
15 Court who is in a position to know one way or the other whether
16 Barclays would have a gain, correct?

17 A. I think it would have been hard for the particular
18 individuals at court to know that with certainty.

19 Q. And no one knew one way or the other who was making -- no
20 one who was making representations to the Court knew one way or
21 the other that it was imperative for Barclays to have that
22 first day gain or it would not close, did they?

23 A. I think that the people representing Barclays then and
24 people present then would have been aware that it was important
25 for Barclays to not to lose money on the transaction. It would

1 have been important for Barclays to take on more assets than
2 liabilities in the transaction. And I believe that they
3 understood how important that was and that those were
4 imperatives. Whether they could or were in a position to
5 translate that into knowledge of a first day gain, I think is
6 doubtful in the absence of a real discussion on that particular
7 point and in the absence of probably of a discussion involving
8 additional people at Barclays. And I don't know -- I doubt
9 that those people would have known that for one way or another
10 whether the imperative of a first day gain, so described, was
11 there or not. They would certainly have known that it was
12 hugely important to Barclays to take on more assets than
13 liabilities and to make money on the transaction and not to
14 lose money on the transaction.

15 Q. When you say imperative of a first day gain, so described,
16 sir, you don't mean to suggest those are my words and not
17 yours, do you?

18 A. No. But I think those words are meaningfully different
19 potentially so that -- because a first day gain may not have
20 been the currency of discussion among the relevant lawyers who
21 were present but certainly the currency of discussion prior to
22 that point would have been about taking on more assets than
23 liabilities and making money rather than losing money.

24 Q. On the --

25 A. So to that extent, I think there was a difference. But

1 otherwise --

2 Q. On the first day. On acquisition at signing as opposed to
3 successfully operating the business thereafter and making
4 money. It had to be a first day gain, correct?

5 A. Well, I think both of those things that you mentioned were
6 very important. Getting back to your earlier question, I
7 thought you were asking me about what the people present would
8 have actually known. And I thought I was answering that
9 question by saying that I think they would have known that it
10 was very important to Barclays to make money, a gain. Whether
11 they would have thought about or know one way or the other
12 whether it was imperative that that be a day one gain, I'm not
13 sure that they would've known that. Nor am I sure that it was,
14 as we've earlier discussed, that it would've been known to
15 others.

16 Q. Sir, have you in the past expressed a view that the Court
17 felt that it was not relevant whether or not a windfall profit
18 did or did not exist in the sale transaction for Barclays?

19 A. It's possible that I used language to that effect in my
20 deposition. I seem to recall you asking me a question about
21 sort.

22 Q. Well, let's turn to your deposition and see if it was in
23 the question or the answer, okay? It's sort of a long answer,
24 sir, so I'm going to ask you first to go to page 38, line 15.
25 And then we're going to read through to page 40, line 2. And

1 then we'll come back to a couple of particular lines in your
2 answer. Let me know when you're at that page, sir.

3 A. I'm at 38 now.

4 Q. Okay. Starting at line 15:

5 "Q. Sir, is Barclays aware of any disclosure to the Court of
6 any profit or gain that Barclays anticipated it would make from
7 the sale transaction?

8 "A. On September the 19th, I'm not aware of anybody
9 identifying to the Court a gain nor am I aware that anybody who
10 made any representations to the Court was in a position to know
11 one way or the other whether Barclays would have had a gain. I
12 do think there were objections at that hearing based on the
13 notion that Barclays would make a windfall profit from the
14 transaction. There was some meaningful complaints, for one of
15 a better word, made on behalf of creditors, I believe, that
16 identified to the Court a strong likelihood that Barclays would
17 make what, in their description, was a windfall profit. And I
18 believe that the judge heard those complaints and dismissed
19 them as being insignificant in light of the importance of the
20 transaction and in the importance of approving the transaction,
21 among other things, for the benefit of the estate, creditors
22 and customers."

23 And here, I'm at line 19:

24 "And I believe also that the Court felt that it was not
25 relevant whether or not that windfall profit did or did not

1 exist. Even if it did, I think that the judge explained there
2 was a greater need in light of the turmoil and the markets at
3 that point in time. But as I mentioned, in particular, for the
4 benefit of the estate and creditors."

5 So was that a truthful answer when you gave it at your
6 deposition?

7 A. Yes, it was truthful.

8 Q. Okay. And at line 19, you see you say "And I believe also
9 that the Court felt that it was not relevant whether or not
10 that windfall profit did or did not exist." You see that?

11 A. I do see that.

12 Q. Okay. So we've agreed, sir, that is a statement you've
13 made before?

14 A. Yes.

15 Q. And you believe it was a truthful statement when you made
16 it?

17 A. I do believe it was true, yes.

18 Q. And does it accurately state Barclays' view of the
19 proceedings that took place in this Court on the 19th of
20 September, 2008 that the Court felt it was irrelevant that
21 there might be a windfall profit for Barclays?

22 A. What I was communicating here, as I think we've earlier
23 discussed, was the aggregation of the recollections of people
24 present and also my own review of what I hoped were relevant
25 documents at the time. And what I think I'm rendering here is

1 the impression that I gleaned from all of that information.

2 Q. Did you learn, sir, that during the course of the
3 hearings, both on the 17th and the 19th, the Court asked
4 specific questions about the value that was being transferred
5 to the purchaser?

6 A. I do recall that, yes.

7 Q. And do you recall that the Court asked specific questions
8 about the consideration given in return for that value? Do you
9 recall that?

10 A. I do recall there were questions, yes.

11 Q. And do you recall that the Court asked at one point how to
12 value the overall value of the transaction? Do you recall
13 that?

14 A. I recall something of that sort, yes. I don't recall the
15 specific words, obviously.

16 Q. And, in particular, with respect to particular portions of
17 the transaction concerning such things as variances on real
18 estate values and whether an appraisal was done for the real
19 estate piece of the deal, the Court asked particularized and
20 particular questions about whether an adequate investigation
21 had been done or whether adequate information was available
22 about the value to be transferred. Do you recall that?

23 A. I do recall that and many other questions about value
24 during the evening, yes.

25 Q. Did you learn about those things in the course of your

1 investigation as a 30(b)(6) witness?

2 A. Yes.

3 Q. So you learned them before you gave this answer, "And I
4 believe also that the Court felt that it was not relevant
5 whether or not that windfall profit did or did not exist." Is
6 that correct?

7 A. As I said, I was giving an impression from the information
8 that I had gathered. There was also a lot of other information
9 relevant to forming the opinion that I expressed during my
10 deposition including a substantial amount of other relevant
11 information regarding valuations of one form or another. Most
12 significant among which was that I think it was clear at the
13 time and it certainly appears to be clear to me that few, if
14 any, values could be ascertained with any certainty. Those
15 valuations were themselves moving around at lightening pace not
16 just at that particular point in time but had been for quite a
17 long time and, indeed, I think continued to thereafter. And it
18 was in light of those additional comments that I -- that
19 appeared to me the phraseology I used at the time of my
20 deposition was appropriate. It may not be artful but it is
21 intended to suggest that there was a lot of information
22 presented to the Court, a lot of information around
23 uncertainties with respect to values. There were particular
24 exchanges, as I read the transcript, which suggested, first of
25 all, that complaints had been raised and that the Court, having

1 heard them, certainly at a minimum declined to take the course
2 urged by those complainants. And from all of that, it seemed
3 to me at the time I gave this answer to your question that
4 there were more important considerations than just the amount
5 of profit that Barclays might make out of the transaction not
6 least among there seemed to me to be that it was very, very
7 difficult indeed, at a minimum, for anybody to establish values
8 either on the night of the 19th or indeed at any other time.
9 And certainly, the fact that it was so difficult to establish
10 those values was a significant part of the reason why I used
11 the language that I used in my deposition.

12 Q. Do you recall learning that at the sale procedures hearing
13 and again at the sale hearing on the 19th, the Court was told
14 that the amount of cure liabilities that Barclays would assume
15 as part of the transaction was in the range of 1.5 billion
16 dollars?

17 A. I don't immediately recall exactly when that suggestion
18 was made but I do recall it was made, yes.

19 Q. Yeah. You know it was made and you know it was that
20 amount, 1.5 billion dollars?

21 A. At some point, yes. I agree.

22 Q. Okay. And do you think, sir, it was important that if an
23 estimate of cure liability assumptions was given to the Court
24 that it be the best estimate of how much would actually be
25 spent on assumed liabilities for cure?

1 A. I think it was important that any estimate that was given
2 was given -- was as good an estimate as it could be in the
3 circumstances. And you happened to pick the cure estimate.
4 It's my belief from what I knew at the time of the transaction
5 and from the discussions I had subsequently that there was a
6 good faith effort made to establish what that number should be.
7 That estimate and that effort was made necessarily by people at
8 Lehman Brothers because Barclays had no prior knowledge about
9 the relevant information that would go into that estimate and
10 nor any ability at the time to test the estimate. And I do
11 believe it was a conditional, if you'll forgive me for using
12 that word, part of the agreement that Barclays might take on
13 that sort of liability.

14 Q. Okay. That was a formal or an informal condition, sir?

15 A. I think that was a much more important than a formal
16 condition.

17 Q. And did you think it was a formal or informal condition
18 that the number bear some relation to what actually would be
19 spent after the transaction by Barclays on assumed cure --
20 liability for contract cure?

21 A. I don't think anybody knew at that point in time what was
22 likely to be spent.

23 Q. Okay. Did you think if nobody knew what was likely to be
24 spent somebody should have put a caveat on that number, like it
25 could be 1.5 billion, it could be 238 million, it could be

1 zero?

2 A. I believe that Weil Gotshal representing Lehman Brothers
3 identified very plainly that it was an estimate and that it was
4 an estimate that was difficult to be sure about not least
5 because Barclays had at least sixty days post-closing to
6 determine which of the contracts relevant to the cure payment
7 might actually be taken on. And indeed, I don't believe that
8 there was an opportunity for Barclays at the time to assess
9 that.

10 Q. I take it from our discussion, sir, over the last half
11 hour or so that since it was a precondition or an imperative
12 for Barclays that there be a first day gain, that Barclays, in
13 fact, did have a first day gain on the transaction. I'm
14 deducing that from the fact that you closed. But is that true?

15 A. I believe we -- I believe we did announce a gain on the
16 transaction, yes.

17 Q. Okay. Did there come a time, to your knowledge, when --

18 MR. GAFFEY: Withdrawn. Could we put --

19 (Pause)

20 Q. Sir, in your book, if you could reach for M-259. And I'd
21 ask you, sir, to turn to page 23, paragraph 56.

22 A. Sorry. Could you repeat the number?

23 Q. Yeah. Just if we could stay on this first page for a
24 moment. This, so you have context, is the objection of
25 Barclays Capital Inc. to debtors' motion for an order under

1 Rule 2004 authorizing discovery of Barclays Capital Inc. You
2 see that in the title?

3 A. I do.

4 Q. Now if you could turn, sir, to page 23. Now I'm going to
5 direct your attention in a moment, sir, to paragraph 56. But
6 do you recall, sir, a time when an application was made by the
7 movants represented here for an order allowing discovery from
8 Barclays --

9 A. Yes.

10 Q. -- concerning the sale transaction?

11 A. Yes.

12 Q. And you saw the papers that were filed in connection with
13 that application for an order compelling discovery?

14 A. I'm sure I did see them. Whether I read all of them, I
15 don't know.

16 Q. Okay. Now, we spoke a moment ago about the fact that
17 Barclays had an immediate gain on acquisition -- and, sir, we
18 can go find the document but you do recall that an immediate
19 gain on acquisition was announced by Barclays in February of
20 2009. Do you recall that?

21 A. I think it was announced then, yes.

22 Q. Okay. Take a look at --

23 A. It's possible that it was announced earlier but I'm not
24 sure.

25 Q. We'll get to that document in a moment. I'll remind you

1 of the exact date. But take a look at paragraph 56, sir, of
2 this brief filed by Barclays in which it's opposing the
3 discovery that was sought. And it says the following:
4 "Finally, LBHI also points to the fact that Barclays has
5 recorded a gain for accounting purposes on the transaction and
6 implies that this supports its request for broad discovery.
7 This accounting gain is irrelevant to the fairness of the sale
8 transaction and is not a basis for seeking discovery. The fact
9 that thus far the acquired businesses have performed well and
10 have generated an accounting gain has no bearing on the
11 adequacy of consideration when the transaction closed." Do you
12 see that?

13 A. Yes.

14 Q. Do you read that sentence to disclose the fact that the
15 gain was on acquisition or that it was from successful post-
16 closing operation of the company?

17 (Pause)

18 A. I'm not sure it is capable of being read in only one way.
19 My understanding is that there was an accounting gain on day 1.
20 My understanding also is that since that day 1 accounting gain
21 -- or if that's the right phrase to use -- was announced that
22 the businesses have operated well and that that, I think,
23 likely yields further gain.

24 Q. Do you think "thus far the acquired businesses have
25 performed well" would allow one to possibly deduce it was

1 referring to a first day gain, sir?

2 A. Well, this phrase seems to be referring to a period which
3 is after first day.

4 Q. It does, doesn't it?

5 A. So I don't know whether, from an accounting standpoint, it
6 would be relevant to the assessment of a first day gain.

7 Q. Okay. And further down in the paragraph, sir, it says
8 "LBHI is not entitled to a purchase price adjustment" -- you
9 with me in the document? It might be easier to follow on the
10 screen where we're highlighting it. Your choice but --

11 A. Yeah. It's highlighted here as well.

12 Q. "LBHI is not entitled to a purchase price adjustment based
13 on the positive performance of those businesses thus far under
14 Barclays' management." Do you see that?

15 MR. BOIES: Your Honor, for contextual purposes, could
16 we read the next two sentences, particularly the last sentence?

17 THE COURT: Sure, although it's on the screen anyway.
18 So we all can see what it says. But let's include it in the
19 record.

20 MR. GAFFEY: I'll read it out loud, Your Honor.

21 Q. "Further the accounting gain does not reflect the
22 substantial costs and expenditures relating to integration of
23 the acquired business assets and does not reflect the
24 considerable risk Barclays undertook at the time by entering
25 into the transaction, governing accounting standards, preclude

1 application of liquidity discounts to the significant number of
2 illiquid positions acquired as part of the transaction and
3 require recognition of anticipated future revenue associated
4 with intangible assets which could depress Barclays results in
5 future periods as the intangible assets are amortized over
6 time."

7 Now, having read you the whole thing, sir, do you see
8 anything in there that suggests that Barclays' gain was on
9 acquisition, it was immediate, it was a first day gain?

10 A. I don't think that it says specifically a first day gain.
11 As I read the whole of the paragraph, it seems to be, at least
12 in part, explaining how post-closing performance from an
13 accounting standpoint is relevant to the establishment of the
14 gain. Again, I'm not an accountant and so I could be
15 interpreting that wrongly.

16 Q. Okay. Well, let's look at another document that describes
17 Barclays' gain and see if we can find a difference between how
18 you describe these things. If you would turn, Mr. Hughes, to
19 M-100 in evidence.

20 MR. GAFFEY: I should mention for the record, Your
21 Honor, we're all trying to do it, M-259, which I referred to a
22 moment ago, is also in evidence.

23 THE COURT: Fine. I'm going to assume that every
24 document that's used is in evidence unless somebody is making a
25 motion to admit it after its use or before its use.

1 MR. GAFFEY: Thank you, Your Honor.

2 Q. Are you at Exhibit M-100?

3 A. Yes.

4 Q. And why don't you turn to page 95 of that exhibit? And
5 for context, sir, you recognize this to be the Barclays'
6 results announcements, figures 2008 that was published in or
7 around February of 2009?

8 A. It says on the front that it's the results announcement,
9 figures 2008.

10 Q. Okay. The date it was published is not relevant to the
11 question I'm going to ask you, sir. I want you to take a look
12 at how the gain is described here.

13 A. Page 95.

14 Q. At page 95, you'll see -- it's one of notes. It's note
15 11, "Acquisitions".

16 A. Yes, I see that.

17 Q. And you can take your time if you'd like, sir, but I'll
18 tell you that what follows in "Acquisitions" describes the
19 transaction. And the paragraph I'm interested in is the second
20 from the last on the page beginning "The excess". Do you see
21 that?

22 A. Where it says "The excess of the value of these assets".

23 Q. Yes.

24 A. Yes, I see that.

25 Q. That's the one. The one that says, "The excess of the

1 fair value of net assets acquired over consideration paid
2 resulted in 2,262,000,000 pounds of gains on acquisition."

3 That sentence. Do you see that?

4 A. I do.

5 Q. Now that tells you that the gain was immediate, correct?

6 A. Well, it says "gains on acquisition". I don't know that
7 that means immediate day 1 or additional factors that need, for
8 results announcements purposes, to be factored into gains on
9 acquisition.

10 Q. So, sir, you think we can read that sentence to mean the
11 gain might have been on the first day or it might have been
12 thus far after successful performance of the company?

13 A. I don't know the answer to that.

14 Q. Okay. You mentioned a few moments ago, sir, that you
15 understood that the numbers that were given to the Court --

16 MR. GAFFEY: We can take it off the screen, Steve.

17 Q. -- the numbers that were given to the Court during the
18 sale hearing were estimates because there was great difficulty
19 in establishing values. Do you recall that?

20 A. Yes.

21 Q. And do you recall at any time, sir, seeing or hearing or
22 reading anything in the -- in connection with the sale hearing
23 where the difficulty in establishing values was explained to
24 the Court?

25 A. It's my recollection that there were many occasions on

1 which numbers given in respect to assets or liabilities were
2 described as estimates and that the context in which those
3 estimates were arrived at were -- made it extremely difficult,
4 to be sure, about any of those valuations or any of those
5 numbers.

6 Q. Would it have been a true statement the day after -- well,
7 you understand, sir, that an agreement was reached on the 16th
8 of September 2008?

9 A. Yes.

10 Q. Would it have been a true statement to say on the 17th of
11 September that the deal had been de-risked?

12 A. I'm not sure what you -- which deal are you talking about?

13 Q. The transaction that Barclays agreed to with Lehman on the
14 16th of September 2008. That deal. Would it have been
15 truthful to describe that deal as de-risked?

16 A. I don't know whether de -- I'm not sure what de-risked
17 means in that context. Could you explain what you mean by
18 de-risked in that context?

19 Q. I'll show you an example of the use of the word, sir, and
20 I'll have a few questions for you about it. Did you ever have
21 conversations -- at the time of the transaction, did you ever
22 any conversations with Bart McDade, the president of Lehman?

23 A. If by "conversations" you mean did we have one on one
24 discussions, no, we didn't. It's possible that we were both
25 participants in one or more discussions at the same time. But

1 I couldn't remember with any specificity.

2 MR. GAFFEY: Your Honor, may I approach? I have a
3 loose --

4 THE COURT: Sure.

5 MR. GAFFEY: -- exhibit for the witness.

6 (Pause)

7 Q. Mr. Hughes, I've put before you what's marked as Barclays
8 -- BCI Exhibit number 110, an exhibit your counsel has put in
9 evidence. And it is a transcript of an analyst call that took
10 place on the 17th of September, 2008 that appears to have been
11 attended by, among others, John Varley, the group executive of
12 Barclays. Do you know John Varley?

13 A. Yes.

14 Q. Okay. And are you familiar with this document? You've
15 seen it before?

16 A. I have seen it.

17 Q. Okay. In fact, you have described this document, this
18 analyst call, as a means of public disclosure of the terms of
19 the deal, have you not?

20 A. I'm not sure whether I used that specific expression. It
21 was, together with the press release, I believe around about
22 the same time, a public disclosure of certain aspects of the
23 transaction that clearly it refers to in the text.

24 Q. Now, if you'd take a look at page 7 of 18 within Exhibit
25 B110. And you'll see a question that's put to Mr. Varley and

1 then this answer. Let me just read it into the record. The
2 question is: "Just going back to the earlier question about
3 what the revenues you are acquiring, you're getting a fraction
4 of the balance sheet and you were kind of hinting that this
5 business could generate up to half of Lehman revenues which
6 would make a fantastic deal from that perspective."

7 "A. (John) And that is because we have not taken the entire
8 balance sheet that creates that income. What we have taken is
9 a portfolio of trading assets and liabilities that are, first
10 of all, de-risked and, secondly, those that need to support the
11 ongoing parts of the business that we have acquired. And
12 therefore, they are predominantly market-making assets and
13 liabilities and very tradable." Do you see that?

14 A. I do see that.

15 Q. Okay. Did you have an understanding -- did you see this
16 transcript at or around 17 September 2008 or listen in on the
17 analyst call that it transcribes?

18 A. The answer to both questions is no.

19 Q. No? Okay. You neither read it nor heard it?

20 A. At the time, no.

21 Q. Okay. And when did you first read the document?

22 A. I couldn't be certain. It's probable that it was in
23 preparing for my deposition.

24 Q. Okay. Is that the deposition where you told me that this
25 document was a document that was a means of public disclosure

1 of a first day gain?

2 A. Again, I don't recall whether I used that specific
3 expression. But certainly, I recall we did discuss this
4 document. I'm sure I did suggest that this was public
5 disclosure of some form, yes.

6 Q. Well, is it accurate to describe the transaction to which
7 Lehman and Barclays agreed on 16 September 2008 as de-risked?
8 Do you have a sense of what that word means now?

9 A. I'm not sure I would use that word. But looking at the
10 parts of the document that you've pointed me to, it looks like
11 it's referring to something else. Exactly what it's referring
12 to, I'm not sure. But as I say, I don't think I would use that
13 expression to describe the transaction that I was then engaged
14 in.

15 Q. Now, you mentioned a moment ago a press release in
16 addition to this analyst call. I'd like to review with you,
17 Mr. Hughes, your understanding of what mechanisms, what means,
18 were used or available to make disclosure to the Court about
19 the terms of the transaction. There was the written sale
20 motion that was filed on the 17th of September. You agree with
21 me?

22 A. Yes.

23 Q. Okay. And there is the sale procedures hearing that takes
24 place before -- that takes place on the 17th of September
25 shortly after those motion papers were filed, correct?

1 A. Yes.

2 Q. And there is the sale hearing itself which took place on
3 the 19th of September, 2008, correct?

4 A. Correct.

5 Q. Okay. And if I understand your views correctly, there's
6 also this analyst call that we've marked as Exhibit 110 -- or
7 that your counsel has marked as Exhibit 110, correct?

8 A. I don't think I -- I don't know whether or the Court
9 actually saw this document or participated in the call or saw
10 the press release. But I think there were masses of public
11 record at the time. So if that's what you mean then I think
12 they were available, yes.

13 Q. Okay. Well, would you turn in your book, so we have both
14 documents in front of you, to tab M-133, Movants' Exhibit 133.
15 Is Movant's Exhibit 133 the press release that you're referring
16 to?

17 A. It looks like it, yes.

18 Q. Okay. Now, to your knowledge, sir, was this press release
19 submitted to Judge Peck?

20 A. Not as far as I know.

21 Q. Okay. And to your knowledge, was Judge Peck invited to
22 join the analyst call?

23 A. I doubt it. I certainly didn't invite him. I don't know.

24 Q. And to your knowledge, were either the press release or
25 the analyst call submitted in written form to the Court in

1 connection with the motion seeking approval of the sale
2 transaction?

3 A. I doubt it very much. I don't think they were.

4 Q. Now apart from this press release and that analyst call,
5 you're aware of no other public record information concerning
6 any disclosure that Barclays planned to have, improved capital
7 ratios or capital accretion or any kind of gain on this deal,
8 isn't that right? Actually, I should add into that the sale
9 motion --

10 MR. GAFFEY: Withdraw that.

11 Q. Sir, when you read the sale motion, did you understand it
12 to provide sufficient information for the Court to deduce that
13 there might be a first day gain for Barclays?

14 A. I don't ever recall reading it with that specifically in
15 mind.

16 Q. So beyond that public document because it's filed in the
17 court's public record, there are the press release and the
18 analyst call, yes, that we've just been talking about?

19 A. Yes.

20 Q. Okay. And beyond those documents, the sale motion that
21 was filed, the press release and the analyst call, are you
22 aware of a single public record document that announced in any
23 fashion prior to the sale hearing on the 19th of September that
24 there would be a gain for Barclays?

25 A. Assuming by sale motion, you mean any of the surrounding

1 papers associated with the court procedures, no, I'm not aware
2 of anything else.

3 Q. Okay. And is it your view, sir, that either the press
4 release or the analyst call described the transaction
5 sufficiently so the existence of a first day gain for Barclays
6 could be deduced?

7 A. Again, I don't know that I'd use in that context the
8 phrase "the first day gain". I think that if one did have
9 notice of these documents, one could establish that there was a
10 significant difference between the value -- the anticipated
11 value of the assets and the anticipated value of the
12 liabilities to see a meaningful difference.

13 Q. Okay.

14 A. It's possible that one could, if one was -- it's possible
15 that one could view that as likely to yield a gain for
16 Barclays.

17 Q. Well --

18 A. Whether it would be a first day gain or not, I don't know
19 that I could say that.

20 Q. Well, let's talk about any kind of gain, sir. You agree
21 with me, do you not, that in order for anyone to deduce that
22 Barclays would make a gain on the transaction, first, second,
23 third day, first week, you'd need to know both the assets
24 acquired and the consideration paid, yes?

25 A. Those would be among the things you'd probably want to

1 know, yeah.

2 Q. Okay. Well, let's just work with those two, the assets
3 acquired and the consideration paid. And you'd agree with me,
4 would you not, that the assumption of certain liabilities for
5 contract cure and compensation items was part of the
6 consideration that Barclays gave in the transaction, correct?

7 A. Could you repeat that?

8 Q. That assumed liabilities for contract cure and certain
9 employee items was part of the consideration that Barclays paid
10 in the transaction. You agree with me there, right?

11 A. I think the contract, by which you mean the APA, provided
12 that the potential employee liabilities were part of the
13 consideration. Again, as a form of that. I don't think that
14 the cure were but --

15 Q. Okay.

16 A. -- certainly, Barclays took on a commitment to meet those
17 cure payments that arose after the sixty-day period in which
18 Barclays had the opportunity to determine which ones they
19 wanted to take on. So there was a commitment. I'm not sure
20 whether strictly it was a formally part of the consideration as
21 defined in the contract.

22 Q. Let's agree to disagree about the cure piece for the
23 moment and just talk about the comp piece. I think I hear
24 you're agreeing with me that the assumption of liability with
25 respect to compensation was part of the consideration that

1 Barclays was giving in the transaction for the assets it was
2 receiving.

3 A. I think that it was though I don't think the size of it
4 was defined in the contract.

5 Q. All right. Even without regard to whether the size of it
6 was defined in the contract. The size of it was described to
7 the Court, yes?

8 A. I think an estimate of the potential exposure to Barclays
9 was given to the Court, yes.

10 Q. Would you look through Exhibit B-110, the analyst call,
11 and the press release marked as M-133, and show us where the
12 compensation piece is referred to at all.

13 (Pause)

14 THE COURT: It's 3:30. We're going to take a break
15 for ten minutes. And that way the witness will have as much
16 time as he needs to read an eighteen-page document to answer
17 the question unless you want to make a representation that it's
18 not there.

19 MR. GAFFEY: I'll make a representation. I don't
20 think he's going to find it, Your Honor. I'll withdraw the
21 question. And a break would be a good idea anyway.

22 THE COURT: Fine. We'll take a ten-minute break.

23 (Recess from 3:32 p.m. until 3:49 p.m.)

24 THE COURT: Let's proceed.

25 MR. GAFFEY: Thank you, Your Honor.

1 RESUME DIRECT EXAMINATION

2 BY MR. GAFFEY:

3 Q. Mr. Hughes, you'll find in the binder in front of you
4 Exhibit M-1, the copy of the asset purchase agreement. Could
5 you turn to that please? And turn to page 6.

6 (Pause)

7 Q. Are you there?

8 A. I am.

9 Q. Okay. And you'll see on page 6 begins the definition of
10 "purchased assets" from the "Definitions" section. You see
11 that?

12 A. I do.

13 Q. And down in subsection (d) is a reference to government
14 securities, Commercial Paper, corporate debt, corporate equity,
15 exchange traded derivatives and collateralized short term loans
16 for a book value as of the date hereof of approximately seventy
17 billion, collectively, long positions. You see that?

18 A. I do.

19 Q. And to not belabor the point, sir, you understand that
20 that language in the asset purchase agreement is an issue with
21 some centrality in this proceeding, yes?

22 A. I believe --

23 Q. At least to Lehman it is.

24 A. -- it's important to the proceedings, yes.

25 Q. Okay. And the fact of the matter, though, is, sir,

1 that -- well, Barclays agreed to the use of the term "book
2 value" in the asset purchase agreement. We can agree on that,
3 yes?

4 A. I think given we signed the document, yes.

5 Q. And you do not know who was the proponent of the
6 particular term "book value", who wanted it in the agreement,
7 is that right?

8 A. I don't know who wanted it in the agreement nor am I aware
9 that it was ever even discussed before it went in.

10 Q. You are aware it was added by hand before it was submitted
11 to the Court?

12 A. I'm not aware of that.

13 Q. Now, Barclays has never felt the term "book value" was of
14 great consequence, is that correct?

15 A. I think that's correct in the sense that one might think
16 of a variety of terms to use in this context. But the fact
17 that that was selected by somebody -- we didn't spend a lot of
18 time thinking about it. So to that extent, it wasn't of great
19 consequence at the time as far as I recall.

20 Q. Well, we've established, sir, that you don't know who
21 selected it but you don't know how much thought went into its
22 selection, right?

23 A. Given that I don't know who did it, yes.

24 Q. Okay. So you don't know one way or the other whether it
25 was a deliberately chosen term, "book value", in that

1 definition, do you?

2 A. Well, what -- I don't. What I meant to say by my earlier
3 reply was that, as I recall at the time, I don't think that on
4 the Barclays side at least there was any great discussion of
5 that term. So whether other people discussed it at the time
6 and considered at length, I don't know. But from Barclays'
7 point of view, I don't recall anybody spending any real time on
8 it at the time. And it's in that sense that I don't think it
9 was, at the time, of any great consequence.

10 Q. And another reason Barclays didn't consider it to be of
11 great consequence is that Barclays was satisfied with the
12 negotiated valuation of the assets to which that provision
13 referred, correct?

14 A. I think Barclays was satisfied that a good discussion had
15 been had and a debate had been had between the parties to
16 arrive at the appropriate values. And so, to that extent, yes,
17 I think Barclays was satisfied at the time.

18 Q. Barclays didn't consider the negotiated values, the
19 process that led to these values to have satisfied it to be an
20 arrival at a book value as that term is commonly understood.

21 A. I don't recall at the time Barclays ever considering that
22 term. I think what Barclays thought that process was about and
23 what the process yielded was an appropriate value for their own
24 securities in question.

25 Q. Barclays did understand, however, when the document was

1 signed that it would be submitted to the Court as a
2 representation of the terms and conditions of the transaction
3 the Court was asked to approve, correct?

4 A. Barclays certainly understood that the document was going
5 to be presented to the Court. Clearly, it was, at that point
6 in time in particular, the core agreement between the parties.
7 Whether the people engaged in the process that you mentioned
8 and who arrived at those then appropriate values knew that that
9 was going to be directly translated to a document that went to
10 court, I don't know.

11 Q. I think we may be missing each other a bit here, sir. In
12 fact, let's just talk about you instead of Barclays. You
13 understood, as a member of the bar, that if this is filed with
14 a motion that it is a representation of the terms and
15 conditions of the transaction, yes?

16 A. Yes.

17 Q. Okay. And one reason that Barclays did not consider the
18 terms to be of great consequence is because by the time the
19 deal closed it had changed meaningfully, correct?

20 A. No. I think before you were asking me about what the
21 consideration -- or I understood you to be asking me about the
22 consideration of that phrase at the time that the agreement was
23 entered into and at the time that the process by which those
24 approximate values were reached --

25 Q. I may have --

1 A. -- what happened after that is different.

2 Q. Let me put another question so that I'm not being
3 confusing. But let me ask you to focus on the period Wednesday
4 the 17th through Monday the 22nd when the closing occurred,
5 okay?

6 A. Yes.

7 Q. By the 22nd -- well, by 19th when the sale hearing took
8 place, Barclays did not think the term book value was of great
9 consequence because by that time the deal had meaningfully
10 changed, yes?

11 A. The two points are not connected in my mind nor were they
12 in Barclays mind at the time. What I'm trying to make clear,
13 and forgive me if I'm not, is that the term "book value" when
14 it was used at that time was not one that, in Barclays' mind,
15 had attracted a lot of discussion. Your reference to changes
16 in the transaction or to facets of the transaction between the
17 17th and the 22nd, certainly, there were changes but I don't
18 associate the two things in the way that your question
19 associates them.

20 Q. Okay. Let's move on to the changes then. We can move on
21 from the definition of "book value" and talk a bit about a
22 repurchase agreement that arose that was entered into between
23 Lehman and Barclays midweek, the week of the 15th of September
24 2008. Do you recall that?

25 A. I do.

1 Q. And did you play any role in the structuring or
2 negotiations or agreement of that repurchase agreement?

3 A. I was not directly involved either in the structuring or
4 the agreement -- the specific agreement between the parties. I
5 was aware of it, certainly.

6 Q. And you were aware of it for, among other reasons -- well,
7 so we can know what we're talking about here, the repurchase
8 agreement was a repo under which Barclays advanced forty-five
9 billion dollars, correct?

10 A. It was a repo that had previously been between the Lehman
11 Brothers and the New York Fed. And New York Fed asked
12 Barclays, first of all, on Monday the 15th, but then more
13 definitely on Tuesday the 16th to take that financing which was
14 then in the form of a repo. Barclays agreed to do that. And
15 then on the 18th Barclays sent forty-five billion dollars of
16 cash to Lehman Brothers pursuant to that repo, correct.

17 Q. And what did Barclays receive in return for its forty-five
18 billion dollars?

19 A. A pool of collateral which turned out to be very different
20 from the pool of collateral that we thought we were going to
21 receive, which was supposed to mimic the collateral that had
22 previously been with the Fed. The whole idea of the Fed -- of
23 replacing the Fed was that Barclays would plainly stand in the
24 shoes of the Fed. At that point in time it was utterly out of
25 the blue, frankly, that Barclays would have to consider that

1 within the transaction led up to that point in time had been
2 discussed among Lehman Brothers and Barclays. So it was -- you
3 know, it was a meaningful intervention, shall we say. But it
4 was particularly important to Barclays, I think, that it knew
5 that the collateral that had previously been the Fed, which at
6 the time we probably deduced was capable of -- probably had had
7 some kind of risk assessment associated with it. If we were to
8 get that same collateral, then at least it would give us some
9 idea of what form of risk we might be taking albeit we didn't
10 have time to go through each and every asset in the repo and
11 identify precisely what it was, and identify precisely what its
12 value would be. I think we probably derived some comfort from
13 the fact that the Fed had felt it appropriate to take that
14 pool, and that was -- as I say, probably some comfort at the
15 time.

16 Q. I believe my question was what did Barclays get in return?

17 A. We got assets on the Thursday night that -- some assets
18 that had been within that pool previously placed with the Fed.
19 But the total amount that was due to be delivered was not
20 delivered. And, indeed, substantial portions of the whole that
21 we did receive turned out to be different from the pool that
22 had previously been with the Fed. So there was a deficit, both
23 in terms of value and a significant difference in the nature
24 and type of the assets that we received back. We should have
25 received, I think, something like somewhere between forty-nine

1 and fifty billion dollars worth of collateral. But I think the
2 ultimate numbers were substantially lower than that.

3 Q. Did there come a time later in the year where Barclays was
4 in a dispute with J.P. Morgan over facts that had arisen out of
5 the repo?

6 A. Yes.

7 Q. In short form, sir, there was a dispute between Barclays
8 and J.P. Morgan input in its simplest form over the fact that
9 Barclays said J.P. Morgan should have sent to Barclays seven
10 billion dollars, yes?

11 A. I'd put it slightly differently from that to that date.
12 The dispute arose because on the night of the 18th by agreement
13 among Lehman Brothers and Barclays because those insufficient
14 collateral being delivered in the repo in place of the seven
15 billion dollars of cash, should be and, indeed, was placed in
16 Barclays account. And that seven billion dollars was moved
17 that was taken out of Barclays' account, put into a different
18 account. That was the providence and the essence of the
19 dispute.

20 Q. I ask this only because I want to ask you if around near
21 the end of the year when there were discussions about a
22 potential resolution of that issue, did you represent -- say to
23 the New York Fed that Barclays had expected to receive forty-
24 nine odd billion, and that the settlement should be based on
25 those numbers?

1 A. I don't recall the specifics of discussions with the New
2 York Fed. I did have communications with the New York Fed
3 pursuant to what were then confidential settlement
4 negotiations. And the precise details of that I can't say.

5 MR. BOIES: May I interrupt? If they're confidential
6 settlement negotiations I would object on the settlement
7 privilege.

8 THE COURT: Look, he said what were then confidential
9 settlement negotiations. I don't know whether or not they
10 remained confidential today.

11 MR. BOIES: I don't know either, Your Honor. And I
12 interject the objection just so that we can be sure that we
13 don't inadvertently get into something that is covered by the
14 privilege.

15 MR. GAFFEY: Your Honor, I think whether they're
16 confidential or not they're not covered by Rule 408. Neither
17 prong is there. Neither an offering compromise nor a
18 discussion made in settlement negotiations. Barclays and the
19 New York Fed don't have a dispute. If Barclays is
20 communicating with the New York Fed about a dispute it has with
21 J.P. Morgan that doesn't come in within Rule 408.

22 THE COURT: Well, that may be absolutely true. I
23 think the reason we're having this dialogue now is that the
24 witness said then confidential settlement discussions, which
25 triggered in Mr. Boise's mind, I suspect, I better stand up and

1 protect the record, and so he did that. The question now is
2 whether or not there's anything that needs to be protected
3 relative to this proceeding.

4 And his concern, I believe, at lest what he expressed,
5 was some kind of privilege. I don't know if anything that the
6 witness is about to get into involves communications between
7 the witness and Mr. Boise or his firm, or any law firm that the
8 may have retained to deal with the issue in connection with the
9 New York Fed.

10 I'm familiar with this if it's the same matter because
11 it ripened into a December hearing involving a settlement that
12 I ended up approving. Is that what we're talking about?

13 MR. GAFFEY: Well --

14 THE COURT: Or we're talking about something else.

15 MR. GAFFEY: It is, Your Honor, and we'll get to it in
16 a while. I can actually solved the immediate problem by moving
17 onto another topic.

18 THE COURT: Even better.

19 MR. GAFFEY: Yeah. And the objection, as Your Honor
20 said, stayed away. So --

21 THE COURT: Well, we filled a couple of pages of
22 transcript that no one need read.

23 BY MR. GAFFEY:

24 **Q. Now, the fact of the matter with regard to the repo, Mr.**
25 **Hughes, is that by the 17th of September the repo was already**

1 an important feature of the sale transaction, is that right?

2 A. It had become very important, not least because from
3 Barclays' perspective of the time it significantly enhanced the
4 risk in the transaction to Barclays.

5 Q. And, essentially, the transaction became -- the sale
6 transaction became an exchange -- became giving to Barclays,
7 the assets and the repo, in exchange for what Barclays paid
8 under the repo, yes?

9 A. No. The transaction --

10 Q. Let me try it again, see if I can get a yes.

11 A large part of the transaction became that Barclays would
12 keep the collateral in the repo -- would keep the collateral in
13 the repo, yes?

14 A. I think Barclays would ultimately take the collateral in
15 the repo, but the transaction was always the same transaction
16 during the course of that week. As I said at the outset, this
17 was not a transaction which started with the premise on the
18 some securities here that we'd like to acquire. There was a
19 much bigger premise which was is there an operational business
20 here that would be strategically valuable to Barclays to
21 acquire. The agreement was for the purchase and sale of that
22 business as a whole, limited, frankly, only to the extent that
23 we agreed that certain assets would be excluded. So the
24 transaction never changed from that point of view at any point
25 in time to my knowledge or recollection.

1 The reason that repo became so significant as I recall,
2 was that in the early part of the week to the extent that the
3 purchase and sale transaction involved securities or securities
4 positions, assets and liabilities related to securities, or
5 derivatives of one for more another, those facets of the
6 transaction changed because of a number of -- for a number of
7 reasons. There were market interventions around their
8 securities, by which I mean various counterparties, including
9 clearing organizations. Their actions made many of those
10 security positions no longer available. There was a
11 significant -- a substantial diminution in the value of those
12 assets. And the intervention of the repo and the request by
13 the Fed that we take on that repo financing changed what had
14 previously been an assessment of risk surrounding pools of
15 assets and liabilities in that securities context into a
16 transaction where Barclays sends forty-five billions of dollar
17 of cash to Lehman Brothers had to wait what then felt like an
18 eternity to see the collateral come back -- or some of the
19 collateral, as it turned out, come back in return for that. So
20 it was significant in my view because of the enhancement of the
21 risk associated with that part of the transaction. But the
22 transaction is still for all the parties involved an effort to
23 sell the business as a whole and to ensure that as far as we
24 were able, as much of that business could stay operational by
25 the time the market's open on the 22nd. So an important

1 feature of the transaction had changed, but the transaction
2 hadn't changed.

3 Q. And do you know if a change in important -- if that
4 particular change in an important feature of the transaction
5 was ever brought to the Court's attention, prior to the
6 issuance of the sale order?

7 A. I believe the facts of the repo was brought to the Court's
8 attention.

9 Q. What you just described to us about the risk and how it
10 changed the deal, and how it became an essential part of the
11 deal, do you know if any of that was described to the Court at
12 the sale hearing on the 19th of September 2008?

13 A. From my recollection from the transcript I don't recall
14 anybody describing it in that way. But, again, I wouldn't have
15 expected people to have understood it in that way. I didn't
16 think people necessarily, for example, understood or
17 necessarily knew at that particular point in time that Barclays
18 had sent forty-five billion dollars in cash on the morning of
19 September the 18th, and had to wait until the early hours of
20 the morning of the 19th to get substantially less in collateral
21 back. So those portions -- those risk elements of the
22 transaction were ones which we were intensely focused upon at
23 the time. But in the overall time available to assess all of
24 that and determine what needed to be done as a result of it, I
25 didn't think we necessar -- the time in that specific example

1 to decide exactly what needed to be presented or not. I think
2 the fact that the repo was described, the securities that
3 formed the collateral in the repo were intended, at least, to
4 be some portion, I believe, of the securities that were
5 previously in the Fed repo. They were all securities assets
6 held in the business of Lehman Brothers, and all of those
7 assets were, in any event, you know, the cornerstone of the
8 transaction to come to Barclays.

9 So I didn't think it really changed the transaction in any
10 material way, it changed the risk assessment from Barclays'
11 point of view, but it hadn't changed the transaction in a
12 material sense.

13 Q. I don't think I've heard a number yet as to the value of
14 the repo -- of the collateral that Barclays received through
15 the repo. What was it supposed to be about that, about fifty
16 billion, correct?

17 A. I think it's slightly below fifty billion, yes.

18 Q. And because of some operational difficulties collateral
19 valued only at approximately forty-two billion was transferred
20 to Barclays, correct?

21 A. I don't recall the actual values at the time. The net
22 distinction between what should have been delivered on the
23 night -- on the Thursday night through Friday morning was seven
24 billion dollars. Hence, the seven billion dollars that -- in
25 cash at the time that should have been -- that was placed in

1 Barclays' account to account for the shortfall in collateral
2 that had been delivered.

3 Q. And that cash then came out of the account and you're off
4 to the races with JPM, right?

5 A. I wouldn't say we were off to the races, because it was a
6 while before we knew that the cash wasn't there.

7 Q. Okay, all right.

8 A. But it's now.

9 Q. You can speak with JPM over that. But the point is in the
10 connection with the repo, itself, we're totaling up to about
11 fifty billion, yes?

12 A. I think, sir, no. Because the actual value of the
13 securities that were delivered turned out to be appreciably
14 less. Secondly, the securities that were, in fact, delivered
15 were different from those in the Fed repo that had formed the
16 basis of the valuation of just below fifty billion. The actual
17 values -- I was not involved in the actual valuations, I don't
18 know today what those valuations were determined to be at that
19 specific point in time, or after the exercise that had been
20 undertaken to establish the differences than what we actually
21 received, and they're values as compared to what we should have
22 received in their values, I couldn't tell you.

23 Q. Rather than go down a path about value, let me ask you
24 this. You did understand that the collateral was received by
25 Bank of New York, which was Barclays' collateral agent,

1 correct?

2 A. I believe -- certainly, the bulk of it, I think, that was
3 received would have been received by BONY.

4 Q. And Bank of New York, as Barclays' collateral agent, put a
5 value of some kind on the collateral that was received,
6 correct?

7 A. I believe they did. It would have been a typical part of
8 a collateral agent's role.

9 Q. That's the service they provide, it includes value in the
10 collateral that they hold, yes?

11 A. It usually does, yes.

12 Q. And Bank of New York put a value on the collateral here?

13 A. I presume they did, yes. I think they did. Though,
14 again, I wouldn't know what the value was. I should add that
15 the Bank of New York in their circumstances, as I believe any
16 collateral agent would be in their circumstance is an agent.
17 And I'm sure part of the role, as we've agreed, is to value the
18 securities that come in as part of a repo for example. But I
19 think ultimately we would have always valued the securities
20 ourselves. I would certainly expect that we did that.

21 Q. After your agent had valued them?

22 A. I beg your pardon?

23 Q. After your agent had valued them?

24 A. Well, I think in those circumstances it would have been
25 inevitable, because at the particular point in time, I didn't

1 think we would necessarily have been able to value everything
2 at one and the same time as the Bank of New York. So it was
3 obviously a process that took time.

4 Q. Yes, after your agent valued them?

5 A. I don't know --

6 Q. It's yes or no question, sir. After your agent valued
7 them?

8 A. I don't know. I don't know whether in fact we did it
9 afterwards, or whether it was all done at the same time. I
10 would imagine that it took several days, but I don't know
11 exactly.

12 Q. Now, further along the week of the 15th, sir, there comes
13 a time when -- when Barclays says to Lehman in substance,
14 there's not enough value in the deal we need more, is that
15 right? That's on Friday morning, the 19th of September.

16 A. I'm not sure whether that was a phrase that was used. I
17 think that by Friday morning because of what had happened
18 during the course of the week, and because of the problems with
19 the repo transaction that the value apparent to Barclays in the
20 business that we were acquiring seemed to be appreciably less
21 than it had seemed earlier in the week. And so I do believe
22 that at that point or somewhere around that time, Barclays made
23 very plain to Lehman that we needed to see -- you know, that
24 was problem because the possibility that transaction might at
25 that point not deal in the submission value became very, very

1 real. And it was -- it looked like an undue risk at that time.

2 Q. Have you ever described this transaction as one
3 irrespective of value with the assets?

4 A. I think I may have used the term irrespective of value.
5 I'm not sure whether I used the precise -- I'm not sure the
6 exact context. I'd probably want to see the context to be
7 sure.

8 Q. Would you see an inconsistency between a deal that was
9 irrespective of value and Barclay saying it won't close because
10 there's not enough value in it?

11 A. I'm not sure I've -- I'm not sure I would have -- I think
12 I would see a distinction. The -- I think it's feasible to
13 make a determination as to whether there is -- whether one
14 would execute a transaction not knowing exactly what the values
15 are, but being able to make judgments about them on the one
16 hand. And on the other hand if you -- if there's -- if there's
17 not a submission of visibility around those assets then perhaps
18 it would be hard to do that. So I could see circumstances
19 where it would be different. So take that example, I think on
20 the Friday morning there were clear -- it was clearly
21 understood between the parties that any valuation with respect
22 to an asset or liability to that point was estimated, there
23 were huge uncertainties around those. But up to that point we
24 were proceeding, we felt in a position to make judgments about
25 it, nevertheless. Not least because we felt that the amount of

1 value coming while distinctly uncertain, it was sufficiently
2 greater we thought than the liabilities that we were taking on
3 at the same time.

4 When he got to Friday morning that imbalance was we felt
5 no longer there. And so I think what was important to us
6 was -- at the time was to try to identify what -- with more
7 precision what the value of the assets was. And if there were
8 other assets that we hadn't been told about in that time that
9 we could see what those looked like, to make the same risk
10 determinations. So I think we could know sufficient, without
11 being certain, to do a deal irrespective of the actual value.
12 By which I mean the precise values. And at the same time need
13 to have shown or need to know more about the value of the
14 assets.

15 So I think to that extent --

16 A. Is that a no, you don't think it's inconsistent, no.

17 Q. Thank you. Now, on the morning of Friday the 19th,
18 Barclays demanded that Lehman provide more value in the deal,
19 yes?

20 A. I wouldn't put it that way. I think --

21 Q. Then let me try another question, sir.

22 A. I beg your pardon?

23 Q. Let me try another question then.

24 A. Okay.

25 Q. I've got to get some of this time sir. Did Barclays

1 communicate to Lehman in any fashion on Friday morning -- on
2 September 19th at any time, did Barclays communicate to Lehman
3 that it needed to see, have, add, identify more value in the
4 deal?

5 A. Yes.

6 Q. Okay. Let's pick a verb. Was it add more value to the
7 deal?

8 A. No.

9 Q. Okay. Was it identify more value for the deal?

10 A. I think that would be a fair word to use.

11 Q. Okay. And the reason that verb's important to you is it's
12 your view that all assets were in the deal unless excluded.
13 And, therefore, a demand for assets would only be identifying
14 that which should be included, yes?

15 A. That -- in part, yes. But --

16 Q. Okay, now --

17 A. -- also because that's actually what happened.

18 Q. Now, there came a time, sir, when a clarification letter
19 was done regarding certain assets that were, to use your verb,
20 identified on that Friday, yes?

21 A. The clarification letter that you speak of was -- was --
22 it was produced, I agree. It had been -- I think it actually
23 started -- work had started on it well before the 19th.

24 Q. As finally signed, one of the topics it addressed was the
25 value that had been, to use your verb, identified on the

1 Friday?

2 A. Correct.

3 Q. In particular, clearance box assets worth about 1.9
4 billion, yes? Clearance box valued by Lehman at one point nine
5 billion?

6 A. I'm not sure now whether there was a value put in the
7 clarification letter, I can't immediately remember.

8 Q. I'm not asking you if the clarification letter said it,
9 I'm asking if you know how much the clearance box assets were
10 valued by Lehman, it was about 1.9 billion, yes.

11 A. That's correct.

12 Q. Okay. And in addition to that, a category of assets
13 called 15c3 assets, correct?

14 A. Correct.

15 Q. And that was worth about 769 million dollars, correct?

16 A. Correct.

17 Q. Okay. And that approximately 2.7 billion dollars was,
18 your verb, identified as assets that were to be transferred in
19 the deal, correct?

20 A. Correct.

21 Q. Okay. And there came a time on Friday afternoon at the
22 sale hearing on the 19th of September, when to your knowledge
23 one of the Weil lawyers explained to those present that there
24 were changes in the deal, correct?

25 A. That's correct.

1 Q. And she put that number at 47.4 billion -- she said that
2 the value of the assets had dropped because of the markets and
3 she gave the Court a number of 47.4 billion dollars, do you
4 recall that?

5 A. I recall the number 47.4, yes.

6 Q. And the assets that were identified -- I'm making quotes
7 here, the assets that were identified the clearance box assets
8 and the 15c3 assets were -- to your knowledge, were not
9 included in the 47.4 that Ms. Fife gave the Court, is that
10 right?

11 A. I don't know what Ms. Fife intended to include. My
12 interpretation of what was said and the interp -- and what
13 Barclays thought at the time was that the 47.4 was a reference
14 to the diminution in value of the long positions that we spoke
15 about earlier.

16 Q. Well, put another way. Then listening to your answer,
17 sir, Barclays didn't know one way or the other whether that
18 47.4 number that Ms. Fife gave the Court included or excluded
19 the 2.7 billion dollars in newly identified assets, correct?

20 A. I think Barclays thought at the time it was a reference to
21 the change in the value of the long positions.

22 Q. And if it was a reference to a change in the value of the
23 long position the clearance box was not part of the long
24 position, correct?

25 A. I don't know the answer to that.

1 Q. Okay. Do you know if the 15c3 assets were part of the
2 long position?

3 A. Again, I don't know the answer to that.

4 Q. So you don't know -- Barclays didn't know whether the
5 newly identified assets; clearance box and 15c3 were included
6 in the 47.4 that Ms. Fife gave to those assembled in Court, is
7 that right?

8 A. I think we didn't know because we didn't know how Ms. Fife
9 had come up with that specific number. I think at the time, as
10 I say, we felt and understood it to be a reference to a change
11 in the diminution of the value of the long positions. As I
12 recall it followed direct -- the number was given directly off
13 the back of an explanation around that. It seemed to me,
14 therefore, as I read the transcript and I spoke to the people
15 from Barclays who were there, that was a, you know, a
16 reasonable interpretation of what was being said.

17 Q. The reasonable interpretation is that it did include, or
18 did not include?

19 A. No. That it was a reference to the seventy. I think it
20 probably was felt if anybody thought about it at the time, and
21 I don't know that they did, I don't think they were included
22 because it was a reference to the long position specifically.
23 So I think if I were able to guess it would be a guess of what
24 was in this client's name.

25 Q. No. We wouldn't want you to guess, sir. Let me ask you

1 another question. To your knowledge were any steps taken by
2 Lehman or Barclays to inform the Court at the sale hearing on
3 the afternoon of the 19th about this identification of new
4 categories of assets?

5 A. I believe the Court was told there were in-train changes
6 to aspects of the transaction. I'm not aware that there was
7 specific mention of the 15c3 assets or the clearance boxes.

8 Q. Okay. Starting with your premise sir, that everything was
9 included unless it was excluded, and then, therefore, there was
10 no need to add the clearance box and the 15c3, have I pretty
11 much got that formulation right?

12 A. It's pretty close.

13 Q. Okay. To your knowledge did anybody at Barclays say at
14 anytime on Friday the 19th in sum or substance, geez, we almost
15 forgot 2.7 billion dollars, why wasn't this added earlier in
16 the week, anything along those lines? Lucky us, found that 2.7
17 billion that hadn't been identified?

18 A. I don't think anybody did think that, because they --
19 the -- as I had said I think more than once, the estimations of
20 value with respect to assets in the transaction were incredibly
21 uncertain at the time. I'm sure that you've heard many people
22 relay the circumstances at the time.

23 Q. Sir, this doesn't go to the value of the assets, this goes
24 to the fact that two categories; substantial categories of
25 assets, are identified on Friday the 19th. They're valued 2.7,

1 market's volatile, maybe it's only two billion dollars. My
2 question is do you know if anybody at Barclays said anything
3 like boy, it's a good thing we asked because we almost left two
4 billion dollars behind; 2.7 billion behind, a big bag of money
5 behind. Do you remember anybody saying anything like that?

6 A. I do recall on the 19th Barclays making it very plain to
7 Lehman Brothers that we were very concerned to see how much
8 value, in fact, was going to be conveyed, that had been to our
9 minds a significant diminution in our estimations with respect
10 to that. Which estimations had been made a very short time
11 before.

12 Q. I'd like to --

13 A. And there was certainly relief that additional assets had
14 been identified in that way, absolutely there was.

15 Q. I'd like to move on, sir, to the clarification letter.
16 Now, the clarification letter was finalized over the weekend of
17 the 20th and the 21st of September, correct?

18 A. I think, in fact, it was finalized in the morning of the
19 22nd, but, yes, that's correct.

20 Q. Now, to Barclays view would it be accurate to say that the
21 clarification letter amended the APA?

22 A. I think it amended certain aspects of the APA, yes.

23 Q. Would it be accurate to say that there were additional
24 categories of securities and other assets set forth in the
25 clarification letter?

1 A. I don't recall that specific language. If you showed it
2 to me I might be able to.

3 Q. Would you turn again, sir, to Exhibit 259? That's that
4 Rule 2004 discovery motion you saw before. And this time I'd
5 like you to turn to page 21, paragraph 52.

6 A. I'm sorry. Page 21?

7 Q. Yeah.

8 A. I have it.

9 Q. Okay. And paragraph 52 begins "it likewise has been
10 repeatedly disclosed that Barclays was entitled to receive
11 additional categories of securities and other assets set forth
12 in the clarification letter which amended the APA." Is that a
13 true sentence?

14 A. I think it's true. I might have expressed it different,
15 but I think it's true.

16 Q. So if I were to ask you the question so would it be
17 accurate to say that there were additional categories of
18 securities and other assets set forth in the clarification
19 letter, would that be an accurate statement?

20 A. It would be accurate.

21 Q. It would? The reason I asked, sir, is you said no at your
22 deposition. And we can go into the transcript. And I'm trying
23 to find whether or not Barclays agrees that additional
24 categories of securities were -- that categories of securities
25 were added by the clarification letter, additional categories

1 of securities?

2 A. Can I ask you a question. What do we mean --

3 Q. Actually, no, sir, you can't. You have to answer my --

4 A. All right, okay.

5 MR. BOIES: I'll object to the form of the question,
6 Your Honor.

7 A. Could you tell me what you mean by --

8 THE COURT: Well, now we have a very interesting
9 dynamic. We have a question, a question, an objection to the
10 form of your witness's question?

11 MR. BOIES: Maybe of both of them, Your Honor.

12 MR. GAFFEY: I guess what comes next, Judge, I'll
13 withdraw the question and I'll try another one.

14 THE COURT: That's the best outcome. We'll start
15 over.

16 Q. Do you agree, sir, that the clarification letter added
17 categories of securities to the transaction?

18 A. It depends what you mean by added. Because --

19 Q. Really? It means there were more than there were before,
20 sir. It means that there used to be X amount of securities,
21 and by signing a clarification letter there were X plus Y,
22 there were more than there used to be, there were additional
23 securities. Securities were added, sir, that's what I mean by
24 added. Were securities added by the clarification letter?

25 A. They were added in the sense that they were added to those

1 that had previously been identified.

2 Q. Okay.

3 A. And those assets were not added to the deal, because they
4 were assets that were owned and used in the business of Lehman
5 Brothers. So by definition they couldn't have been added to
6 the deal. They were added to the APA by the clarification of
7 that. Equally there were assets that were taken away.

8 Q. Now, let me move on to another topic, sir. Did there come
9 a time in October of 2008, Mr. Hughes, when you were engaged in
10 communications with Shari Leventhal at the New York Fed about
11 Barclays' dispute with Chase, that we talked about a little
12 while ago?

13 A. Yes.

14 Q. Okay. And would you turn in your book to Exhibit 701?

15 MR. BOIES: Your Honor, this document we do have a 408
16 objection -- Rule 408 objection to. They're statements made in
17 compromised negotiations.

18 MR. GAFFEY: They're not negotiations, Your Honor.
19 There is no dispute between the Fed and Barclays.

20 THE COURT: Okay. Well, let's -- first of all, let me
21 ask question number 1. Is Movants' Trial Exhibit 701 not in
22 evidence?

23 MR. GAFFEY: This is one from Mr. Tambe's examination
24 earlier today, Your Honor, where --

25 THE COURT: We have the backend of it in.

1 MR. GAFFEY: That's right, and I'm going to move in
2 the rest of it now.

3 THE COURT: Okay. We had a discussion this morning
4 when Mr. Schiller was sitting in that first chair. And he
5 raised an objection to the document. And it was apparent that
6 the witness who was then on the stand, Mr. Clackson, had
7 received the initial e-mail from Mr. King. That's Bates number
8 ending in 97.

9 Now, the rest of the document we can talk about
10 whether or not it's 408 governed or some other issue. At the
11 moment, the only party that it seems to me is in a position to
12 raise an issue as to this would be the New York Fed to the
13 extent that there's an aspect of this that's unresolved by the
14 approved settlement. Isn't -- isn't this simply background to
15 a matter which is now public?

16 MR. GAFFEY: Well, I think that's right, Your Honor.
17 But I also think just on the text of the document, itself, it
18 just isn't settlement negotiations. This particular document
19 does not address or involve a dispute between Barclays and the
20 New York Fed. It addressed and involves a dispute between
21 Barclays and J.P. Morgan about which Mr. Hughes is writing to
22 the New York Fed. If he wrote that e-mail to me it wouldn't be
23 anymore protective under Rule 408.

24 MR. BOIES: Your Honor, if I may? What happened was
25 Barclays took over the repo from the Fed. Portions were not

1 delivered, or portions that we believed should have been
2 delivered weren't delivered. There was then a series of
3 negotiations that involved the three parties to that
4 transaction; the Fed, Barclays and J.P. Morgan. And I think
5 the issue that counsel is raising is whether under 408(a)(2)
6 it is necessary that the statement be part of a offer, that is
7 whether it's a back and forth of negotiations, or whether it is
8 sufficient to be a statement made in compromised negotiations.
9 And we believe that this is clearly a statement made in
10 compromised negotiations.

11 Now, rather than delay it --

12 THE COURT: Well, I think importantly 408(a), and
13 let's just focus on this, "evidence of the following is not
14 admissible on behalf of any party when offered to prove
15 liability for, in validity of, or an amount of a claim that was
16 disputed as to validity or amount, or to impeach through a
17 prior inconsistent statement or contradiction." I don't know
18 yet how this document is being used, other than to explore
19 aspects of the consideration paid in this case. I don't see
20 Rule 408(a) as implicated at all so far. And I'm going to
21 overrule your objection, but I'm not admitting the document
22 yet. And I'll give you the ability after we see the
23 examination proceed to renew the objection once I understand
24 what's going on a little more clearly.

25 MR. BOIES: Thank you, Your Honor.

1 MR. GAFFEY: Just for practicality, Your Honor, I take
2 it I can proceed without regard to other foundation or other
3 objections that exist to the 408 issue?

4 MR. BOIES: With this witness it's just a 408 issue,
5 because this witness was involved in the communications.

6 MR. GAFFEY: Thank you, Your Honor.

7 THE COURT: Ask away.

8 BY MR. GAFFEY:

9 Q. Mr. Hughes, why were you in correspondence with Shari
10 Leventhal of the Fed about the repo between Lehman and
11 Barclays?

12 A. Because -- two reasons, really. The Fed was involved in
13 the repo transaction at the outset. And, indeed, was
14 facilitating the discussions, shall I say, between J.P. Morgan
15 and Barclays in an effort to try to resolve the dispute between
16 them. Both parties I think were engaged in discussions, quite
17 appeared and engaged in communications with Ms. Leventhal to
18 try to see if the Fed could help broker a resolution, so to
19 speak. That was the essential reason.

20 Q. And in the course of broker -- of trying to assist to
21 broker a resolution, did you have discussions with Ms.
22 Leventhal about the representations that had been made to this
23 Court in connection to the value of the sale transaction?

24 A. I don't recall speaking about the sale transaction. It's
25 possible, but I don't recall it specifically.

1 Q. Your Honor, I'm going to move on to another document, but
2 I move the admission of Exhibit 701 based on the witness's
3 description of it. I don't think it falls within the ambit of
4 Rule 408.

5 MR. BOIES: Your Honor, I just heard the testimony
6 differently. I think that to the extent that what we have is
7 the current foundation it does fall within 408. I think the
8 witness's answer established that.

9 THE COURT: I'm going to reserve on this. I'm going
10 to take a look at the questions and answers in reference to
11 408. And if the parties feel strongly enough about this issue
12 and this document you can submit letter briefs on the question
13 before the start of the trial on Monday morning. I'll examine
14 those and reserve judgment on admissibility. But I'd like
15 supplemental briefing on the application of 408 in reference
16 to, both the document and the testimony that has just been
17 adduced with respect to the document.

18 MR. GAFFEY: For the completeness of that record, Your
19 Honor, I have another similar document. Let me just put it in
20 the record. It's only one letter, you're not going to get two
21 letter briefs. But there's another document I'd like to show
22 the witness.

23 THE COURT: Okay.

24 MR. GAFFEY: It's Trial Exhibit 705. It's not in the
25 book, Your Honor, so may I approach the witness?

1 THE COURT: Yes. Is this another document that may be
2 covered by 408(a).

3 MR. GAFFEY: Maybe this will fall -- it's more of the
4 same correspondence that I --

5 THE COURT: Okay.

6 MR. GAFFEY: I might suggest, Your Honor, for
7 practicality, if we can just agree the testimony about the
8 reason for writing the letter would be the same. I just need
9 to have this offered to the Court and we can both brief this as
10 if he had given the same answer.

11 MR. BOIES: I so stipulate, Your Honor.

12 THE COURT: Fine, it's in the same zone of uncertain
13 treatment.

14 MR. GAFFEY: Thank you, Your Honor. And with that,
15 Your Honor, I have no further questions for Mr. Hughes.

16 THE COURT: It looks like we have Mr. Maguire. And
17 will the committee be asking any questions?

18 MS. TAGGART: No, Your Honor.

19 THE COURT: Okay.

20 MR. MAGUIRE: If I might approach, Your Honor?

21 THE COURT: You may.

22 MR. MAGUIRE: Thank you.

23 (Pause)

24 MR. MAGUIRE: If it please the Court. And, Mr.
25 Hughes, as you know, I'm Bill Maguire, I represent the SIPA

1 trustee.

2 CROSS-EXAMINATION

3 BY MR. MAGUIRE:

4 Q. I'd like to follow-up first with some questions you were
5 asked, some testimony you gave on the subject of Barclays day
6 one gain. Are you with me?

7 A. Yes.

8 Q. I believe you said in the course of your testimony that
9 there was no a built in gain, is that your position?

10 A. I think I said it wasn't built in in the sense that the
11 deal wasn't built in in the sense of deliberately structured by
12 the parties. As I said there was certainly an imperative for
13 Barclays to achieve a gain.

14 Q. From Barclays standpoint it was absolutely essential that
15 a gain be built in to the transaction, isn't that correct?

16 A. Again, I would put it differently. As I think I said
17 earlier, it was -- it was essential to Barclays that Barclays
18 derived a gain from the transaction.

19 Q. In fact, sir, if there was not a gain from the transaction
20 you didn't have authority to do the deal, isn't that right?

21 A. I don't know whether specifically there was -- I'm not
22 sure exactly what you mean by authority. I think it was -- it
23 was certainly -- it was certainly what we always wanted to
24 achieve. And I think to have derived a loss was certainly not
25 part of the authority, so to speak. But I think that we were

1 taking risks in the transactions. So I don't think we could
2 say definitively what -- in that sense, in terms of authority,
3 it would be a gain. Certainly, the board I'm sure wanted to
4 achieve a gain.

5 Q. You know more than that, sir, do you not, you were present
6 as you told Mr. Gaffey at Mr. Diamond's deposition, were you
7 not?

8 A. I was.

9 Q. And he testified at that deposition. And it is admitted
10 by Barclays and stipulated by the parties in the admitted fact
11 stipulation at paragraph 117 that Mr. Diamond testified that
12 there had --

13 MR. BOIES: Excuse me, do you have a copy?

14 MR. MAGUIRE: I can show you. Paragraph 117, Diamond
15 testified. And I'll read the applicable part.

16 Q. "So when I say capital accretive, accretive to the capital
17 ratios, which means that the assets, liability mismatch had to
18 have a mismatch in favor of a positive capital accretion or we
19 weren't authorized to do a deal."

20 MR. BOIES: Could I ask for context, introduction to
21 that, the first two sentences of what is in the stipulation be
22 read for context.

23 THE COURT: Mr. Boise -- I've overheard his ask for
24 context. Has he read enough or not enough?

25 MR. BOIES: No, Your Honor. What I wanted him to do

1 is read the first part of this paragraph in the stipulation
2 which has the -- immediately proceeds what he read.

3 THE COURT: Why don't we read that and avoid the
4 objection.

5 Q. Reading in full, sir, paragraph 117 of the admitted facts
6 stipulation. Diamond testified, "The regulators that we are
7 responsible to, the financial services authority in the UK
8 holds us to specific capital standards. So, for example, a
9 core equity, tier one equity and it was becoming increasingly
10 clear during this time that they were focusing more on core
11 equity than tier one equity. And that they were thinking the
12 banks would potentially have to hold higher core equity. So
13 when I say capital accretive, accretive to the capital ratios
14 which means that the asset liability mismatch had to have a
15 mismatch in favor of a positive capital accretion or we weren't
16 authorized to do a deal."

17 It's pretty clear from Mr. Diamond's testimony that the
18 board did not give him authority to do a deal unless there was
19 a gain, a mismatch in favor of Barclays, isn't that right, sir?

20 A. If it involved as you said it then that would have to be
21 right, because he was the board member to whom the authority
22 was delegated. So he would be much more accurate about it than
23 I could be. So, yes.

24 Q. If Bob Diamond did not have authority from the board to do
25 this deal without an asset liability mismatch then you did not

1 have authority to do this deal on that basis, correct?

2 A. Correct.

3 Q. Now, you were here Monday, sir?

4 A. Yes.

5 Q. You heard a number of questions on the general subject of
6 whether this deal was approved by the board of the holding
7 company, Lehman Brothers Holdings Inc., on the understanding
8 that it involved an exchange of reasonably equivalent value, or
9 a wash. You generally recall that?

10 A. I recall that, yes.

11 Q. And is it your position, sir, that Barclays did not agree
12 to do this deal on the basis of reasonably equivalent value?

13 A. That's correct.

14 Q. In fact, Barclays could not have done this deal on the
15 basis of reasonably equivalent value given the mandate from its
16 board, isn't that right, sir?

17 A. I think that's probably right to say because that wouldn't
18 necessarily have led to a capital agreed to transaction to use
19 the phrase that Bob used.

20 Q. And that mandate from the board put Barclays in a very
21 awkward position coming into this courtroom on Friday the 19th,
22 isn't that right, sir?

23 A. No.

24 Q. Barclays was coming to this Court seeking an order; a
25 judicial order authorizing the sale. And that order involved a

1 judicial finding of reasonably equivalent value or fair
2 consideration, isn't that correct, sir?

3 A. First of all, it was Barclay seeking an order. And I
4 couldn't tell you offhand exactly what the requirements are
5 for -- as a legal matter for the order to be made. So if
6 that's what you're suggesting I'd have to look at that just to
7 be sure that I'd be accurate.

8 Q. Well, let's take a look, then, at the sale order, sir.
9 It's in your book and it's at tab 6.

10 MR. MAGUIRE: And this, Your Honor, is Movants' Trial
11 Exhibit 441.

12 Q. If you turn, sir, to page 6 of the sale order. And I'd
13 invite your attention, sir, to paragraph M, "Consideration".
14 Now, Barclays was before this Court seeking an order that
15 provided "that the consideration here constitutes reasonably
16 equivalent value or fair consideration as the case may be."
17 You see those words, sir?

18 MR. BOIES: Can we have the very next parenthetical
19 that explains the concept, Your Honor?

20 THE COURT: Okay, let's -- we can do that, it's
21 just -- we're talking about an order that was prepared, no
22 doubt cooperatively, by counsel for Barclays and counsel for
23 the seller. That's how it works in bankruptcy court. The
24 purchaser has a meaningful role in the drafting of the order
25 that approves the sale. And while I have no record on it, I'm

1 absolutely confident that's true. For purposes of examining
2 this witness who is the chief internal legal officer at the
3 time for the buyer, given his sophistication there is no need
4 for context. He can read as much or as little as he chooses to
5 before answering the question.

6 Q. Barclays understood, did it not, sir, that an issue before
7 the Court was whether there was reasonably equivalent value in
8 this sale?

9 MR. BOIES: Object to the form of the question, Your
10 Honor.

11 THE COURT: Overruled.

12 A. I -- having read the language that you just alluded to
13 would interpret it as being reasonably equivalent by all fair
14 consideration. My understanding is that fair consideration was
15 given in the transaction. And that as the paragraph goes on to
16 state that the purchase agreement did represent a fair and
17 reasonable offer to purchase the assets in the circumstances,
18 and that no other personal other group -- no other person, or
19 entity, or group of entities other than the purchaser has
20 offered to purchase the purchased assets, and so on. So I
21 didn't understand this at the time to be -- the phrase
22 "reasonably equivalent value" was the focal point. I would
23 have I think then and now focused more on ensuring that there
24 is fair consideration for the transaction. And I think there
25 was fair consideration.

1 Q. Barclays understood that an issue before the Court was
2 whether there was reasonably equivalent value in this sale,
3 isn't that correct, sir?

4 A. I'm not sure I can say what the -- reasonably equivalent
5 refers to. I don't know definitively what that requirement is.
6 The sale order that you're equating from and that you're
7 looking at seems to be saying that the consideration was that
8 or fair consideration, and goes on to explain in further detail
9 what seems to be important in terms of consideration for the
10 sale.

11 Q. Are you denying that Barclays understood at the time that
12 an issue before this Court at the sale hearing was whether
13 there was a reasonable reasonably equivalent value? Do you
14 deny that, sir?

15 A. I don't deny it that it was before the Court because it
16 appears in the sale order.

17 Q. And you understand that an inquiry into reasonably
18 equivalent value involves some disclosure of what is the
19 consideration that Barclays is providing, and what, on the
20 other hand, it is getting, you understand that, do you not?

21 A. I do. And I believe that disclosure was made.

22 Q. Now Barclays was paying 250 million dollars for the
23 business, isn't that right?

24 A. It paid 250 million dollars, it paid some further amounts
25 for some real estate, and it assumed liabilities.

1 Q. With respect to the business it was paying 250 million
2 dollars for the business, isn't that right, sir?

3 A. I don't recall a specific language used. Certainly 250
4 million dollars was paid.

5 Q. And that was disclosed to the Court, was it not, that
6 Barclays was paying 250 million dollars for the business of
7 Lehman Brothers, Inc.?

8 A. Again, I don't have in front of them the precise language
9 used. But the disclosure regarding the 250 million payment was
10 certainly made, yes.

11 Q. And it's your view that one of those assets of the
12 business, just one, the 15c3-3 asset alone was worth 769
13 million dollars, isn't that right?

14 A. That is the value of that asset.

15 Q. And you would agree with me, sir, that the proportion of
16 250 million to 769 million, just on that asset alone, would
17 mean that from that one asset Barclays was getting more than
18 three times what it was paying for the business, isn't that
19 correct, sir?

20 A. Again, I wouldn't view the transaction that way. I would
21 view the transaction and the disclosure regarding it as a
22 disclosure around the entirety of the transaction, not just the
23 two specific features that you mentioned.

24 Q. But if you do look at those two features, if you look at
25 250 million dollars for the business, and you look at just one

1 asset from the business; that one 15c3 alone, then you have
2 Barclays getting three times its money -- more than three times
3 its money back on just that one asset alone, isn't that
4 correct?

5 A. I don't think that -- I think that's a fair way to look at
6 the relative assets and liabilities and the transactions as a
7 whole. Obviously, there's a significant difference of almost
8 three times between 769 and 250. But that's not how Barclays
9 viewed the transaction. I don't believe that's how the
10 transaction was described. And I do believe the relevant
11 disclosures about the transaction were made to the Court
12 through -- on the night of the 19th.

13 Q. Let's get back and see where we are. The board gives a
14 mandate that this must have a mismatch of assets and
15 liabilities or else, and that must be in favor of Barclays and
16 against the estate or else there's no authority to do the deal,
17 right?

18 A. I don't think that that's, again, how I've characterized
19 it. Because you've used the phrase against the estate. I
20 believe that the transaction in question which was before the
21 Court, not just the two facets you've described was, in fact, a
22 transaction that saved the estate probably quite a lot. And
23 the estate probably wouldn't have had any of those assets on
24 Monday morning if the transaction hadn't happened.

25 Q. The game, the mismatch, had to be in favor of Barclays,

1 not in favor of the estate, right?

2 A. There was a mismatch as between assets and liabilities
3 conveyed by Lehman Brothers.

4 Q. If the mismatch went the other way in favor of the estate
5 and against Barclays you didn't have authority to do the deal?

6 A. I think that's fair.

7 Q. So Bob Diamond sends his team out to negotiate a deal --

8 A. Can I just add one point to that? I don't think it's -- I
9 wouldn't have said that at the time were looking at a mismatch
10 as between Barclays and the estate. We were negotiating for
11 the purchase of the ongoing operations of Lehman Brothers. And
12 it was -- I think it was understood among the parties to
13 determine if that transaction didn't happen, and I do believe
14 this was discussed in the court, too, but if the transaction
15 didn't happen, there was likely going to be no value left for
16 the estate. And I believe that was the subject for quite a lot
17 of discussion.

18 Q. The mismatch, and the assets and the liabilities had to be
19 in favor of Barclays or there was no deal, right? You didn't
20 have authority?

21 A. That's -- I think I've already agreed.

22 Q. Your negotiators succeed after sending Lehman off on the
23 Friday asset scramble in getting all these assets together so
24 that they have a deal that has the buffer, the mismatch,
25 exactly what the board requires. And then the parties come to

1 this Court with Lehman and Barclays apply to the Court for an
2 order; a judicial finding approving the sale. That's the
3 chronology, is it not, sir?

4 MR. BOIES: Objection, Your Honor.

5 THE COURT: What's the objection?

6 MR. BOIES: Compound; misstates the record.

7 THE COURT: Well --

8 MR. BOIES: Argumentative.

9 THE COURT: Okay. Well, I don't think it's any of
10 those things. It's just saying that's the sequence, that's the
11 chronology. And since that's the pending question and it seems
12 to me that it is, in fact, a correct statement of the
13 chronology, if the witness has a disagreement with that he can
14 say so. Is that or is that not the chronology?

15 THE WITNESS: As a chronology events of the type you
16 described they did happen in that sequence, yes. But I'm not
17 sure I would describe that chronology in the way that you
18 described it.

19 Q. Barclays came before this Court looking for an order
20 approving this sale, isn't that right?

21 A. Yes, together with others.

22 Q. In fact, it needed -- it, in fact, was not prepared to go
23 forward with the transaction unless there was a judicial sale,
24 unless there was an order approving the sale, isn't that
25 correct?

1 A. I think that's correct. We were advised that that was the
2 most appropriate thing to do in those circumstances.

3 Q. And Barclays was well represented in this courtroom, was
4 it not?

5 A. Yes.

6 Q. You had five partners from Sullivan & Cromwell, did you
7 not?

8 A. I don't know the exact number of people from Sullivan &
9 Cromwell that were here.

10 Q. You had five partners from Cleary Gottlieb, did you not?

11 A. Again, I don't know if there were five, there were
12 certainly several. From each firm, I think there were at least
13 two from each firm, probably.

14 Q. You had your in-house legal staff here?

15 A. Two people, yes.

16 Q. You had top negotiators here, did you not?

17 A. Yes.

18 Q. You had Michael Klein here?

19 A. Correct.

20 Q. You had Archie Cox here?

21 A. Correct.

22 Q. You had Gerard LaRocca here, at least at the beginning of
23 the hearing, did you not?

24 A. Correct.

25 Q. It's also your position, is it not, that under this

1 transaction Barclays was entitled to billions of dollars of
2 Lehman's cash, Lehman's cash margin assets, isn't that correct?

3 A. Yes.

4 Q. And you would agree that it would be relevant to any
5 inquiry into whether this sale provides reasonably equivalent
6 value for the parties to disclose to the Court that it includes
7 billions of dollars of Lehman cash and cash equivalents?

8 A. I didn't think that at the time of the sale either Lehman
9 Brothers or Barclays -- certainly Barclays, knew what the
10 composition of the margin was that you're referring to. So I
11 didn't think Barclays was in a position to say anything one way
12 or another about the cash elements of that portion of the
13 assets that were in Lehman's business.

14 Q. Well, what about over the weekend when Barclays obtained
15 information about billions of dollars of Lehman's cash? Did
16 Barclays consider coming back to the Court and advising the
17 Court that, in fact, Barclays has determined that there is
18 billions of dollars of Lehman's cash that, we, Barclays,
19 believes is part of this sale? Did you consider doing that,
20 sir?

21 A. Whether it was specifically over the weekend or not
22 Barclays did consider whether there was a need to go back to
23 the Court. And I think we were advised that really it was not
24 necessary. I believe also that the representative of Lehman
25 Brothers considered the same question and came to the same

1 conclusion. I don't know today exactly when it became reliably
2 clear what amount of cash was then held in the business of
3 Lehman Brothers as margin. Certainly, before the sale hearing
4 I didn't think we had any information on that. And it took us
5 a very long -- it took us a good amount of time after that
6 Friday to establish I think anything really reliable about the
7 margin, and, indeed, the exchange traded business as a whole.

8 Q. If you turn in your binder to your deposition transcript.
9 And I'll invite your attention to page 86, starting at line 7:

10 "Q. Can you tell me in how it was clear to the Court that
11 Barclays would be acquiring margin?

12 "A. It was clear to the Court because margin is necessarily
13 part of the exchange traded business of Lehman Brothers."

14 You were asked that question and you gave that answer,
15 sir, did you not?

16 A. I did.

17 Q. And it was your position was it, sir, that the Court could
18 have deduced from the facts that Barclays was acquiring
19 exchange traded derivatives the fact that there could also
20 be -- or was, also, billions of dollars of Lehman cash being
21 provided to Barclays?

22 A. I think in the follow-up question I said that I didn't
23 believe there was a figure given with respect to it. But I did
24 believe then and I believe now that it was clear from the
25 documents that the exchange traded business -- derivatives

1 business was being conveyed it was part of the business. By
2 definition, any of the assets used in connection with that
3 business were part of the sale. I believed then that the
4 exchange -- it's widely known that the exchanged traded
5 derivatives business requires margin in connection with the
6 conduct of that business. And I think that's why I gave you
7 the answer that I gave you during the deposition.

8 Q. In fact, sir, there was absolutely no disclosure to the
9 Court that billions of dollars of Lehman cash was going to
10 Barclays, isn't that right?

11 A. I think I said that I'm not aware that a figure with
12 respect to margin or any form of margin was either known or
13 given.

14 Q. It's a little bit more than that, sir, is it not? If you
15 turn in your binder to tab 2, the asset purchase agreement.

16 A. Is the binder that you gave to me?

17 Q. Yes. And if you turn, sir, to page 11. You'll see in
18 Section 2.2 we have excluded assets, you see that, sir?

19 A. Yes.

20 Q. This was before the Court, was it not?

21 A. I believe so.

22 Q. And you know that in this transaction there were assets
23 that were purchased and there assets that were excluded, right?

24 A. Yes.

25 Q. And this section provides, "That nothing herein contained

1 shall be deemed to sell, transfer, assign or convey the
2 excluded assets to purchaser and seller directly and indirectly
3 shall retain all right, title and interest to, in and under the
4 excluded assets." You're with me?

5 A. I am.

6 Q. Now, sir, please turn to the deposition of excluded assets
7 on page 2 of the document. That's at the very bottom of the
8 page. Excluded assets subsection (b). And that provides that
9 "Excluded from this sale is all cash, cash equivalents, bank
10 deposits, or similar cash items of Lehman and its
11 subsidiaries." And the only exception is the retained cash,"
12 which is 1.3 billion dollars here.

13 A. I don't think that's what it says. I think it says after
14 the word "subsidiaries": "(the retained cash) other than 1.3
15 billion" and so forth.

16 Q. Other than quibbling about the words, do we have any
17 difference in substance here?

18 MR. BOIES: Objection, Your Honor.

19 THE COURT: Objection to "other about quibbling to the
20 words?"

21 MR. BOIES: Yes, Your Honor.

22 THE COURT: Okay. Why don't we rephrase the question
23 to remove the term quibble which is somewhat pejorative.

24 Q. Sir, the retained cash, that's 1.3 billion dollars here,
25 that was originally in the asset purchase agreement, that was

1 originally in the sale, wasn't it?

2 A. 1.3 billion dollars of cash was originally in the sale. I
3 think that there was a confusion in the drafting of this
4 document in the sense -- it was more than one confusion I think
5 in the sense that there is a paragraph of this sort in excluded
6 assets, but also in the purchased assets, I believe. And that
7 was one of the many reasons why a clarification letter became
8 necessary right from the word go. There were several aspects
9 of the APA, including some of the definitions that needed to be
10 clarified because they appeared to confuse to everybody
11 involved.

12 Q. And the retained cash was originally 1.3 billion dollars?

13 A. I think that it was agreed there was 1.3 billion dollars
14 that would go to Bar -- which would be included and go to
15 Barclays. That number changed. As I say there were confusions
16 around the proper definition of retained cash. But I think the
17 substance of it was that 1.3 billion originally was to go to
18 Barclays as part of the transaction.

19 Q. And that ultimately became -- that was then changed to 700
20 million dollars?

21 A. That I believe to be right, yes. And the balance I think
22 was then expected to remain with Lehman Brothers.

23 Q. And then that 700 million dollars, which was the amount of
24 the retained cash, was ultimately dropped out of the deal
25 altogether?

1 A. That's correct.

2 Q. And so what you had left was an exclusion of cash and no
3 exception for the retained cash?

4 A. I think there was an exclusion of cash as a separate
5 asset. So cash that wasn't connected with any other activity.

6 Q. So you would not describe anything that we have read so
7 far as a disclosure to the Court that billions of dollars of
8 Lehman cash, margin, and cash equivalents were being conveyed
9 in this sale from Lehman to Barclays?

10 A. I don't think it was that disclosure because it relates to
11 free cash that was the subject of specific discussion among the
12 parties. And separately there was specific discussion. I
13 don't know the specific discussion about margin, but there was
14 a separate discussion about the exchanged traded derivative
15 business.

16 Q. Were you here for Harvey Miller's testimony?

17 A. Yes.

18 Q. You saw when we put up on the screen the representations
19 that were made to the Court on the subject of cash at the sale
20 hearing? We can do it again for you if you want.

21 A. Yes. I do recall that, yes.

22 Q. Okay. And the one representation was that of Lori Fife
23 who told the Court there's no cash that's being transferred to
24 Barclays. Do you recall that?

25 A. I recall that being said, yes.

1 Q. And that certainly was not a disclosure to the Court hat
2 billions of dollars of Lehman cash and cash equivalents were
3 being transferred to Barclays.

4 A. I think at the time and today Barclays believes that that
5 was a reference to the change in retained cash that you've just
6 described.

7 Q. It certainly was not disclosing that billions of dollars
8 of Lehman cash and cash equivalents were in the sale to
9 Barclays, isn't that correct, sir?

10 A. That's correct. It didn't refer to anything other than
11 the retained cash, as far as I was aware.

12 Q. And, similarly, when the Court was told at page 242 of the
13 sale hearing transcript by Mr. Miller, and this is at line 13
14 to 14: "Cash, we're not transferring any cash to Barclays;
15 that's out of the agreement." Again, that was not a disclosure
16 that billions of dollars of Lehman cash and cash equivalents
17 were somehow in the sale to Barclays, was it, sir?

18 A. It wasn't a disclosure of the type that you've described.
19 My understanding was a disclosure, again, that referred to
20 something else.

21 Q. So it did not disclose that billions of dollars of Lehman
22 cash and cash equivalents were being transferred to Barclays,
23 did it, sir?

24 A. It did not make the disclosure you described. As I say, I
25 think it was a reference to a debate around some specific LBIE

1 cash. And I believe, since you referred to Mr. Miller's
2 testimony that he did say that cash in that sense -- free cash
3 was not conveyed in the deal. And that's how Barclays
4 interpreted it then and interpreted it now.

5 Q. Do you know the total amount in dispute between Barclays
6 and the trustee in terms of Lehman's cash and cash equivalents
7 today?

8 A. I don't know the specific number. I do believe that in
9 terms of margin there was certainly at one point around about
10 four billion dollars worth of -- as a total amount in dispute,
11 I believe.

12 Q. That's quite a big number, is it not, sir?

13 A. Absolutely, yes.

14 Q. Do you think that four billion dollars would have had any
15 relevance to a judicial inquiry as to whether there was
16 reasonably equivalent value in this sale?

17 A. It is absolutely possible that that would be a relevant
18 number. I don't think that -- as I said before, Barclays was
19 not aware of that number at the time. Nor do I believe that
20 anybody at Lehman Brothers was capable of giving any reliable
21 information about that number at that time.

22 Q. Well, you keep saying that Barclays wasn't aware at the
23 time. There's no doubt, is there, sir, that Barclays actually
24 got the statement from the Options Clearing Corporation,
25 itself, over the weekend of the clarification letter, which

1 disclosed the margin at the OCC alone?

2 A. I didn't know exactly when Barclays first received
3 something from the OCC of the type you described. It's
4 possible that it came over the closing weekend, I just don't
5 know.

6 Q. At any event, even after receiving whatever information it
7 did over the weekend and learning of the amount of Lehman
8 margin at issue here, Barclays did not come back to this Court?

9 A. Not only did Barclays not think that that was necessary, I
10 believe since you mentioned the closing weekend that the
11 trustee was also perfectly well aware, was being implored by
12 the SEC to agree to the conveyance of all forms of margins.
13 Because Barclays was taking over all of those relevant
14 accounts. So I think it was actively discussed. And at the
15 time I think everybody, at that point, probably first learned
16 that there would have been some cash-in margin. Whether we
17 knew exactly what the amount was I don't know. I'm not sure
18 the trustee knew exactly what the amount was. But certainly it
19 was clear to everybody at the time that margin was coming in
20 whatever form.

21 Q. Actively discussed?

22 A. Well, I don't know if it was actively discussed, but there
23 was an active flow of communication. I certainly recall there
24 were e-mails at the time that were addressed, among others, to
25 either the trustee or representatives of the trustee to

1 representatives of Lehman Brothers. I recall having
2 discussions myself with our own advisors about it over the
3 closing weekend. The discussion were not focused on cash, they
4 were focused on ensuring that all of the margin associated with
5 the exchanged traded derivatives businesses were properly
6 conveyed. The OCC was equally concerned to ensure that that
7 happened in the appropriate way. And so from that perspective
8 we knew about margin and we knew, I think at that point, there
9 was some cash within the margin that the OCC held. And I think
10 all the parties knew that.

11 Q. Are you suggesting that there was any active discussion
12 between anyone at Barclays or representing Barclays, and anyone
13 representing the trustee in which Barclays disclosed to the
14 trustee that there was billions of dollars of Lehman
15 proprietary margin, that Barclays wanted in this transaction
16 and was taking in this transaction and disclosed to the trustee
17 that that was cash and cash equivalents of the Lehman estate,
18 that Barclays was taking not for the account of customers, but
19 for Barclays own account? Was there any such active
20 discussion?

21 A. I'm not aware of a discussion that has --

22 Q. Do you withdraw the answer in which you suggest that there
23 was an active discussion?

24 THE COURT: For a comment, witness should finish his
25 answer before we start the next one.

1 A. I'm not aware of a discussion of the type that you just
2 described. I did have active discussions with our lawyers
3 about margin. There was as I said a series of e-mail at a
4 minimum that the trustee represented it saw on the subject of
5 margin. I believe, but I couldn't be absolutely certain right
6 now, but I believe that within those communications there was
7 not only a discussion and an agreement to convey all of the
8 margin; it was made plain in those communications that some of
9 the margin was in the form of cash. As I've said I don't think
10 there was ever an opportunity for Barclays at that time to
11 ascertain what amount of cash there was.

12 Q. At no point?

13 A. Clearly the trustee in my view the trustee knew there was
14 cash as part of the margin. I believe that the trustee knew
15 not least because during the course of that period there was a
16 collateral agreement referring to it. There was a transfer and
17 assumption agreement which referred to it. And as I've said,
18 several e-mails which made plan that there was cash included in
19 margin. The amounts, I agree with you I don't think were
20 actively discussed.

21 Q. In fact, you're not aware of any discussion, are you, sir?

22 A. Other than the ones that I mentioned, no.

23 Q. No discussion with anyone from the trustee?

24 A. Correct.

25 Q. Now, you've mentioned several times that Barclays was

1 uncertain about the amount of margin on Friday. There was no
2 uncertainty at all on the part of Barclays with respect to the
3 15c3 assets, isn't that right?

4 A. There was uncertainty in the sense that Lehman and/or Weil
5 were concerned that to deliver the 769 million excess from the
6 15c3 account might need some form of regulatory approval. So
7 there was that concern. Barclays I believe dealt with that by
8 agreeing with Weil -- with Lehman Brothers that if it turned
9 out that that regulatory approval was necessary and wasn't
10 forthcoming the 769 million dollars of securities will be
11 delivered in any event, from some other source.

12 Q. Barclays' position, is, is it not, that it believed from
13 the very beginning it was entitled somehow to these assets,
14 absolutely and unconditionally, irrespective of regulatory
15 approval, isn't that right, sir?

16 A. I wouldn't use the word unconditionally because there was
17 the possibility that it didn't -- it wouldn't ultimately come
18 from the 15c3 excess, and it would come from somewhere else.
19 If that's what you mean by unconditionally then, yes. But
20 otherwise -- I wouldn't describe it as unconditionally in that
21 sense.

22 Q. And the amount of assets that Barclays was claiming, in
23 fact, was not 769 million. As of Friday Barclays' position was
24 that it was entitled to everything in the customer reserve
25 account, isn't that right, sir?

1 A. I think Barclays was told by Lehman Brothers that there
2 was a much higher number available or a higher value available
3 from the 15c3 reserve. And that was excess and capable of
4 being delivered. So there was a point on Friday, the precise
5 time I can't exactly recall, but there was a time on Friday
6 when we thought it was more like 1.7 because that is what
7 representatives of Lehman Brothers said early on Friday
8 morning.

9 Q. The 769 million dollars was government securities, right?

10 A. I don't know whether it was all government securities, but
11 there were securities.

12 Q. And the one billion dollars was cash?

13 A. As it turned out, I believe that's correct.

14 Q. And as of Friday Barclays believed it was getting the 1.7
15 billion, according to Barclays, right?

16 A. Yes. Whether we knew at that point in time the
17 composition I don't know. In fact, I believe that when the
18 asset was first raised and the possibility that it could be
19 delivered was first raised early on the Friday morning, just a
20 number was given. I don't believe that there was any
21 discussion at that point in time what the composition of the
22 15c3 reserve account was. There was just somebody from Lehman,
23 I believe either Paolo Tonucci or Ian Lowitt, saying we can
24 deliver this asset to -- this is something that we hold in our
25 business, it's available, its value for you.

1 Q. And that 1.7 billion dollars?

2 A. Yeah, I think so, roughly, yeah.

3 Q. And Barclays learned that before the sale hearing?

4 A. We were told that was available. There were then
5 discussions which followed, both with respect to the 15c3 asset
6 and the clearance boxes to try to ascertain what, in fact, was
7 meant by those assets, and what, in fact, the composition was.

8 Q. And would you agree, sir, that it would be relevant to an
9 inquiry whether there's reasonably equivalent value in this
10 sale for the people to disclose if, indeed, Barclays was
11 claiming that this was part of the sale, that there was 1.7
12 billion dollars, whether it was cash or government securities,
13 that was part of the sale going to Barclays?

14 Q. Again, as I tried to indicate in one or more of the
15 earlier questions, what Barclays thought was important was that
16 there was the appropriate disclosure. As we've said Barclays
17 certainly had an obligation to say something if it felt that
18 the Court was not getting the information that it needed with
19 respect to the transaction. But Barclays believed that the
20 Court was getting the necessary information. Because these
21 were assets that were already part of the business, which was
22 the transa -- the essence of the transaction, I don't think
23 Barclays felt at the time that it was necessary to raise those
24 matters specifically. And certainly by the time of the sale
25 hearing there was still sufficient uncertainty around the

1 values that we couldn't have put a number on it reliably in any
2 event.

3 Q. Barclays knew that the Court was not provided with the
4 total amount of assets that were being conveyed to Barclays,
5 isn't that right, sir?

6 A. I think in what -- I think that the Court was told the
7 total amount. The Court just wasn't given a precise value as
8 to all of that. Because the total amount was all of the assets
9 in the business, less what was excluded.

10 I should just note that there were several other assets
11 that were part of the discussions still at that point in time.
12 Several other assets referred to in the clarification letter
13 which also weren't raised specifically as I understand it. So
14 there were other assets which were left out of the disclosure
15 as you call it. And I believe for the same reason that neither
16 Weil nor anybody else thought that was the necessary
17 disclosure.

18 Q. Have you concluded your answer?

19 A. Yes.

20 Q. If you turn, sir, to page 96 of your deposition transcript
21 and read from line 21. You were asked the following questions
22 and you gave the following answers:

23 "Q. So I am still waiting for you to explain to me whether
24 Barclays believed the Court was told what the total value was
25 of the assets that Barclays was acquiring?

1 "A. I believe the Court was given an estimation of that total
2 value.

3 "Q. And what was that estimation?

4 "A. I don't know what the total number was. I don't think a
5 total number was actually given."

6 So which is it, sir? Was the Court given or was the Court
7 not given the total value of the assets that were being
8 conveyed to Barclays?

9 A. I don't think a total number was given for all of the
10 assets in the business that were conveyed.

11 Q. In one respect, sir, there was full disclosure at the sale
12 hearing. And that's with respect to the liabilities that
13 Barclays was assuming, isn't that correct?

14 A. Again, I don't know whether the full number -- total
15 number was given. Or if, indeed, that number an accurate
16 number. I couldn't say.

17 Q. Isn't it a fact, sir, that you cannot think of any
18 meaningful liability that was not disclosed to this Court?

19 A. I think the liability in the repo transaction, for
20 example, were not necessarily disclosed in full. Because,
21 again, the actual liabilities weren't known. I'd have to think
22 longer to be able to determined exactly which liabilities were
23 accorded values. I think, as I've said before all of the
24 estimations of value were precisely that. I think that it was
25 understood, or at least as I reviewed the sale hearing

1 transcript and as I reviewed the recollections of others, it
2 seemed that everybody understood that the estimations were
3 that, and it was also impossible to come to actual total
4 numbers.

5 Q. If you turn, sir, to page 104 of your deposition
6 transcript. Starting at line 3, you were asked the following
7 question and you gave the following answer:

8 "Q. Can you tell me what were the most significant liabilities
9 that were not disclosed to the Court?"

10 Over Mr. Stern's objection to the form.

11 "A. I don't think any meaningful liability was not disclosed
12 to the Court."

13 You were asked that question and you gave that answer,
14 sir?

15 (Pause)

16 Q. You do not deny that testimony, sir, do you?

17 A. I don't deny the testimony.

18 MR. MAGUIRE: In that case, Your Honor, I have no
19 further questions.

20 THE COURT: Well, this means we're at interesting
21 moment in the trial. It's Friday afternoon, almost 5:30. A
22 long week with very few breaks. And we have the witness on the
23 stand. We have two choices. One choice is to push on assuming
24 Mr. Boise's examination may be concise, another is to adjourn
25 until Monday morning. Call the witness back at a time to be

1 determined during the chambers conference to take place in a
2 few moments, and proceed with him as our first witness on
3 Monday on cross-examination. I rather think that may be the
4 better course, but I will leave it to the counsel to tell me if
5 I'm wrong in that.

6 MR. BOIES: I don't think you're wrong, Your Honor,
7 particularly in light of what I think is the importance of the
8 chambers conference that we have scheduled.

9 THE COURT: So my suggestion is if it's not a major
10 inconvenience to the witness, he can enjoy New York this
11 weekend; he's probably going to do that anyway. And he'll be
12 our first witness. And Mr. Boise will tell him what time that
13 will be.

14 And then anyone else who doesn't need to stay for the
15 chambers conference is excused. And I'll be out in another,
16 say, five or ten minutes, without my robe and we'll visit
17 together and talk about scheduling and the timing of deliver of
18 the letter briefs. It doesn't have to be a weekend exercise,
19 if you want to defer that question to another time. These are
20 things that we can talk about profitably I think, including the
21 schedule for the week ahead.

22 We're adjourned until Monday morning at a time to be
23 determined. And I'll see you in ten minutes for the chambers
24 conference. We're otherwise adjourned.

25 (Whereupon these proceedings were concluded at 5:25 p.m.)

I N D E X

T E S T I M O N Y

WITNESS	EXAM BY	PAGE	LINE
Patrick Clackson	Mr. Tambe	10	7
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Jonathan Hughes	Mr. Gaffey	114	16
Jonathan Hughes	Mr. Maguire	203	1

E X H I B I T S

NO.	DESCRIPTION	ID.	EVID.
M-45N	Native version of Excel Spreadsheet	19	
M-701	E-mail chain between Mr. King and Mr. Clackson and others admitted for a limited purpose only		43

C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a
true and accurate record of the proceedings.

LISA BAR-LEIB

AAERT Certified Electronic Transcriber (CET**D-486)

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Date: May 5, 2010